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IN THE UNITED STATES DISTRICT COURT.
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

DAVID BOSHEA,)	
Plaintiff ,)	
)	
v.)	CASE NUMBER: ELH-21-cv-00309
)	CIVIL JURY TRIAL
COMPASS MARKETING, INC.,)	
Defendant.)	EXCERPT OF PROCEEDINGS
)	Testimony of Donna Eisenberg

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE ELLEN L. HOLLANDER
UNITED STATES SENIOR JUDGE
Thursday, February 22, 2024
Baltimore, Maryland

A P P E A R A N C E S

FOR THE PLAINTIFF:

BY: GREGORY JORDAN, ESQUIRE
BY: THOMAS GAGLIARDO, ESQUIRE

FOR THE DEFENDANT:

BY: STEPHEN STERN, ESQUIRE
BY: SHANNON HAYDEN, ESQUIRE

Also Present:

Noah Wolf, Paralegal

Proceedings Recorded by Mechanical Stenography
Transcript Produced by Computer-Aided Transcription

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I N D E X

WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
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Donna Eisenberg
By Mr. Jordan: 3

Examination outside the presence of the jury:

Donna Eisenberg
By Mr. Jordan: 60
By Mr. Stern: 63

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(Requested portion of excerpt begins.)

(12:14 p.m.)

THE COURT: Next witness.

MR. JORDAN: We'll call Donna Eisenberg.

THE COURT: Okay.

THE CLERK: Ma'am, if you could remain standing and raise your right hand for me.

(Witness, sworn.)

THE CLERK: You may have a seat. While talking clearly into the microphone, can you please state your full name and spell your last name for the record?

THE WITNESS: My name is Donna Eisenberg. Last name is spelled E-i-s-e-n-b-e-r-g.

THE CLERK: Thank you.

D I R E C T E X A M I N A T I O N

BY MR. JORDAN:

Q. Good afternoon, Ms. Eisenberg.

A. Good afternoon, sir.

Q. What is your title and with whom are you employed?

A. I'm a forensic document examiner and I work for myself, and previously for the Federal Government.

Q. Okay. How long have you been engaged in the field of --

THE COURT: I'm sorry to interrupt. You said you worked for the Federal Government. For whom did you work?

THE WITNESS: I worked for the United States Secret

1 Service Forensic Lab for ten years and I worked for the
2 Department of Homeland Security for 24 years which was
3 originally the Immigration and Naturalization Service. So it
4 was 34 years of Government service.

5 **THE COURT:** Thank you.

6 **BY MR. JORDAN:**

7 Q. And what were the time periods you were in the Secret
8 Service?

9 A. I worked for the Secret Service from 1988 to 1998 and
10 then for which was then INS which became Homeland Security
11 from 1998 to 2022.

12 Q. Okay. And then I believe that you indicate you were a
13 private examiner for yourself?

14 **THE COURT:** I can't hear you, counsel.

15 Q. That you were a private examiner for yourself. Do you
16 have your own company or something else?

17 A. I work for myself. It is my own company. My own company
18 is called Forensic Document Examination Services, LLC and I
19 opened my private practice in 2008.

20 Q. Okay. And what are your principal duties as a forensic
21 document examiner?

22 A. As a forensic document examiner, I routinely receive
23 documents whose authenticity is in question. I determine
24 whether they're counterfeit or genuine or if they've been
25 altered, page substituted, something like that and/or

1 hammering identification examinations.

2 Q. And what study and preparation have you had for this kind
3 of work?

4 A. I have a bachelor of arts degree from the University of
5 Maryland. I have a master of forensic science degree from the
6 George Washington University. And I successfully completed a
7 three-year apprenticeship program at the Secret Service where
8 I learned all aspects of documents such as printing processes,
9 writing instruments, hammering identification, things like
10 that.

11 Q. What studies, if any, have you done or finished for your
12 formal service training at the Secret Service?

13 A. Yes, sir. I routinely attend professional conferences and
14 I do workshops and seminars all related to topics in the field
15 of forensic document examination.

16 Q. Are you recognized by any professional organization?

17 A. Yes, sir. I am certified by the American Board of
18 Forensic Document Examiners which is the North American body
19 recognized by the Courts for certifying qualified document
20 examiners.

21 Q. And is that something that involves written, oral, or
22 something else?

23 A. So in order to become board certified you need
24 professional and educational requirements. You need letters of
25 recommendation and then you need to sit for a written test,

1 and then a practical test, and then orally defend the
2 practical test to a board. And after completing that you are
3 deemed qualified. And then every five years you have to
4 maintain your certification by earning 40 points. And you
5 earn points by presenting papers, writing papers, attending
6 workshops, attending conferences.

7 Q. Have you obtained those 40 points within the required
8 periods of time?

9 A. Yes, sir. I've been -- I've been qualified by the Board
10 -- by the Forensic Board of Questioned Document Examiners
11 since 2022.

12 Q. And do you know what the AAFS is?

13 A. I'm sorry, 2002. Sorry.

14 Q. I should have got that.

15 A. Yeah.

16 Q. Do you know what the AAFS is?

17 A. Yes. I'm also a member of the American Board of Forensic
18 Document Examiners -- I'm sorry, I'm a member of the American
19 Academy of Forensic Sciences Questioning Document Section, so
20 I'm a member of there as well.

21 Q. How long have you been a member of the AAFS?

22 A. Since 2018.

23 Q. Okay. Have you ever published any materials concerning
24 document examination?

25 A. Yes, sir. I wrote a chapter for a textbook that was

1 released in 2021 and I wrote a chapter that was in the
2 textbook and the textbook is called Forensic Document
3 Examinations in the 21st Century.

4 **THE COURT:** And AAFS, is that something for which
5 there are eligibility criteria or you just pay your dues?

6 **THE WITNESS:** No. There are educational
7 requirements and professional requirements in order to be
8 accepted, yes.

9 **BY MR. JORDAN:**

10 Q. Which is the one that you had to have the 40 points?

11 A. That's the American Board of Forensic Document Examiners.

12 Q. And similar to the AAFS, that's not something where you
13 just send a check, get a certificate?

14 A. No, you need to have -- your employment and your line of
15 work is crucial for the acceptance into the AAFS.

16 Q. Okay. Have you ever been qualified as an expert witness
17 in a court of law?

18 A. Yes, sir. I have.

19 Q. And when did that occur?

20 A. I've testified approximately 100 times and I've been
21 testifying since 1991.

22 Q. Okay. Have you ever been rejected as an expert witness
23 for document examination?

24 A. No, sir. I have not.

25 Q. I'm sorry, I didn't hear you.

1 A. No, sir.

2 Q. Okay.

3 **MR. JORDAN:** Your Honor, we offer Donna Eisenberg as
4 an expert in the area of handwriting and document
5 identification.

6 **THE COURT:** Any objection?

7 **MR. STERN:** No, Your Honor. Just asking if Ms.
8 Eisenberg could move the microphone a little bit closer. I'm
9 having trouble hearing at times.

10 **THE WITNESS:** Yes, sir. I'll just lean forward.

11 **THE COURT:** The witness will be received as an
12 expert in the area of handwriting and document identification.

13 **BY MR. JORDAN:**

14 Q. Are you an expert in any other area, by the way? I hope
15 I was not --

16 A. No, sir, I'm not.

17 Q. Noah, if you could bring up Exhibit 18 which is Ms.
18 Eisenberg's report. And I think as we indicated to you, Your
19 Honor, we offer this into evidence as her forensic handwriting
20 report.

21 **THE COURT:** So as I'm understanding there's no
22 objection; is that right?

23 **MR. STERN:** That's correct, Your Honor.

24 **THE COURT:** Okay, then it will be received.

25 **BY MR. JORDAN:**

1 Q. Okay. So Ms. Eisenberg, Exhibit 18, what is it?

2 A. That is the forensic handwriting report I wrote on
3 October 11, 2021.

4 Q. Okay. And how is it that you came about to prepare this
5 report?

6 A. I received an inquiry from you and I was asked to look at
7 the questioned document which is the -- which was a digital
8 reproduction of Mr. White's signature on the Compass
9 Marketing, Inc. agreement related to employment and
10 post-employment competition with 20 known exemplars that were
11 provided to me as well of Mr. White's signature.

12 **MR. JORDAN:** Your Honor, could we have notice taken
13 that the questioned document that she is examining is our
14 Exhibit 8? Because I didn't put it up on the screen, but I'm
15 trying to move things along.

16 **MR. STERN:** I just want to make sure the number is
17 correct. I'm sure it is. No objection.

18 **THE COURT:** No objection? Okay.

19 **MR. JORDAN:** So that is -- the questioned document
20 is the document just for the jury, it's the one that's in
21 evidence.

22 **THE COURT:** So the questioned document is
23 Plaintiff's Exhibit 8.

24 **MR. JORDAN:** Correct.

25 **BY MR. JORDAN:**

1 Q. And so I'm sorry, you said you had how many exemplars to
2 review in addition to the questioned document?

3 A. 20.

4 Q. And do you have an opinion regarding your forensic
5 examination of this document?

6 A. My opinion is no conclusion. So let me back up and
7 explain the -- sorry, the opinions that are available for a
8 document examiner. We start at no conclusion, meaning we have
9 no bias one way or the other if the person did or did not
10 write the questioned signature. Then above that, above no
11 conclusion is indications the person did write. Above that is
12 they probably wrote. Above that is highly probably wrote and
13 above that is identification. On the flip side we have it in
14 the negative. Indications did not write. Probably did not
15 write. Highly probably did not write and elimination. Because
16 of the evidence that was provided to me and the deficiencies
17 that were in the evidence, I was not able to determine one way
18 or the other if Mr. White did or did not write his own name on
19 this questioned signature.

20 Q. Okay. And what factors caused you to make that
21 determination?

22 A. So in order to do a forensic handwriting examination
23 there's three criteria. You need quality of the writing,
24 comparability so that you're comparing the same thing, in this
25 case the same name that's written, and quantity. You need

1 enough known exemplars to do an examination. So did you want
2 me to talk about that?

3 Q. With regard to quality, what was your view of the
4 document, Q1 of that Exhibit A and the exemplars that you've
5 stated?

6 A. So the best evidence is ink on paper. You can see fine
7 lines, you can see pen movements, you can see pretty much
8 everything you need to see when conducting a forensic
9 handwriting examination. So because the copies that were
10 provided to me, the question and the known evidence, there was
11 diminished line quality because these documents were either
12 copies, or scans, or a combination of those. And it makes
13 sense that a first generation photocopy is better than a fifth
14 or sixth or tenth copy. And what we had here, none of them
15 were first generation photocopies. They were all a combination
16 of scans and copies and that -- what happens is when you have
17 regular handwriting, like if you go to sign your name you
18 don't think about signing it because you know how to sign your
19 own name. So the pen hits the paper and you start writing.
20 Sometimes the pen hits the paper before you're actually ready
21 to start the letter and that's called a pen drag. So pen drags
22 are usually light in stroke. And often when you have a
23 reproduction and as I said, a copy of a copy, those light
24 strokes often go away. They are often not visible at all.

25 And so again, that's part of the problem that I had with

1 this evidence, that a lot of the potential fine lines and pen
2 movements were not visible in these -- in the evidence.

3 Q. Other than the questioned document, Compass was the one
4 who provided all of the 20-something documents; is that
5 correct?

6 A. That's my understanding, yes.

7 Q. And then I believe that you indicated that one of the
8 factors was comparability. In terms of comparability, what do
9 you review, take into account and determine?

10 A. So when you do a handwriting examination you need to
11 prepare like items. For example, you can compare the word
12 "apple" to "apple." You cannot compare the word "apple" to
13 "orange" because you need the same letters and letter
14 combination.

15 In this particular case we're dealing with the question
16 and the known signatures were all the name of John D. White.
17 The problem was that Mr. White has an illegible signature,
18 meaning you can't really read. You can see the J and that's
19 pretty much the only letter that you can clearly see in his
20 signature.

21 In addition, Mr. White -- so all of us have a range of
22 variation in our writing. Nobody can write the exact same way
23 twice. People are not machines. Every time, if you sat down
24 and wrote your name ten times on a piece of paper all in a row
25 you couldn't take any one of those signatures and superimpose

1 it on the other and have it perfectly aligned. That's called
2 variation and that's because we're human.

3 Some people have a narrow range of variation in which
4 case you don't need a lot of known samples to do a comparison.
5 Mr. White has an extremely wide range of variation so that
6 within the known signatures it would be difficult to take any
7 one of the known signatures, make it a question and compare it
8 to the others because it's just so broad, his range.

9 Now in normal handwriting examinations we ask for 10 to
10 20 known samples and that's usually sufficient. In this case
11 because Mr. White's range of variation is so broad, I needed
12 more than the 20 that I had. Literature will say that there
13 are some cases, in my opinion such as this one, where you need
14 30, 40, 50 specimens because his range is so wide. So the
15 question is does the questioned signature fall within the
16 range of variation exhibited within the known. And I needed
17 more known to make that determination.

18 **THE COURT:** Did you ask for them?

19 **THE WITNESS:** Yes, ma'am. I did.

20 **THE COURT:** And did you get them?

21 **THE WITNESS:** No, ma'am.

22 **MR. STERN:** Your Honor, can we approach?

23 **THE COURT:** Okay.

24 **(Counsel approached the bench.)**

25 **MR. STERN:** We were never asked for any additional

1 samples.

2 **THE COURT:** What?

3 **MR. STERN:** We were never asked for any additional
4 samples. This is the first I've ever heard of this.

5 **MR. JORDAN:** That's not true.

6 **MR. STERN:** I don't -- there has never been a
7 request for additional samples. I'd like to know where that is
8 because that was the first time I've ever heard that.

9 **THE COURT:** Did you ask them for them?

10 **MR. JORDAN:** Yeah.

11 **MR. STERN:** I don't recall ever hearing that before
12 because we would have gotten them. We're confident this is a
13 forgery.

14 **THE COURT:** Nobody asked me. So if you had this --
15 I mean, this is kind of stunning because that would have been
16 a subject of a motion to compel or something because if the
17 expert needs more and you didn't get them --

18 **MR. STERN:** I never heard this before.

19 **THE COURT:** I believe you. I'm just saying it's
20 surprising because it just was sort of called out for me to
21 clarify that. I didn't expect that answer.

22 **MR. STERN:** I didn't expect that either, otherwise I
23 would have tried to object in advance and not let the jury
24 hear that. I don't know what to say.

25 **MR. JORDAN:** It's in her report, the issue of that

1 the quantity was insufficient quantity in her report.

2 **THE COURT:** Okay, but that's not asking him. It
3 makes it sound like -- I mean, you'll be able to come back, I
4 think, with that clarification. Nobody asked you.

5 **MR. STERN:** I can't testify.

6 **THE COURT:** No, but did she ever communicate. Well,
7 it's got to be cured.

8 **MR. STERN:** I know. And I don't know how -- that
9 pun has been now dropped out there and it looks like I've
10 engaged in misconduct.

11 **THE COURT:** No, I wouldn't say misconduct, but I
12 think it's important to clarify that you weren't -- the
13 defense wasn't asked to provide additional --

14 **MR. STERN:** All I can say is did you ask--

15 **THE COURT:** Did you transmit a request to them?

16 **MR. JORDAN:** I believe I spoke with Mr. Stern with
17 regard to this. It's been a long time, but I recall --

18 **MR. STERN:** I don't remember because I would have
19 gotten more. We have nothing to hide.

20 **MR. JORDAN:** I mean, his expert and our expert had
21 the same number. His said they had a sufficient number of
22 exemplars.

23 **THE COURT:** These would have been addressed if
24 anybody had asked me, if I had known that there was a problem.
25 I didn't know.

1 **MR. STERN:** I wouldn't have withheld more copies.
2 We had plenty more examples.

3 **THE COURT:** Well, you can come to a stipulation, if
4 you can, that there was no -- the defense does not believe it
5 was ever asked to provide additional exemplars.

6 **MR. JORDAN:** You certainly can make that statement.
7 I don't agree with that, but you can certainly --

8 **THE COURT:** Well, if it's not accurate we can't say
9 it. But the thing is if you want to look and see where you
10 transmitted that kind of request, I know you didn't ask me to
11 decide it, or Judge Copperthite.

12 **MR. STERN:** Even if I did get that and I didn't
13 respond there would have been a follow-up. It wouldn't have
14 been like hey -- I'm not going to say a crass word, but there
15 was none of that. We produced everything we could. So Greg,
16 I--

17 **MR. JORDAN:** You know what? I recall it, it's in
18 her report. It's been in her report for two years.

19 **THE COURT:** Well, that's in her report that she
20 didn't have enough so I think --

21 **MR. STERN:** But that's her conclusion. My expert
22 says it's the standard.

23 **THE COURT:** But the problem is that it has left --
24 it suggests that they didn't cooperate.

25 **MR. STERN:** Yes. My expert says the standard is

1 normal. The norm is either 10 to 15 or 15 to 20.

2 **THE COURT:** It was so glaring. That was why I asked
3 it. Like she didn't have enough, well how come? I figured
4 you were going to --

5 **MR. STERN:** I didn't have time. I didn't know what
6 she was going to say. She's saying --

7 **THE COURT:** It's in the report. It's not a
8 surprise, I guess.

9 **MR. STERN:** --that the request was made. That's
10 different. Yes, I was going to cross-examine her on this about
11 the norm because our expert says the norm is 10 to 15 or 15 to
12 20 and she had that number. She's just saying there's a wide
13 range and my expert says you can reach the conclusion which is
14 very different than saying I'm withholding documents. Two very
15 different things. She said that, but it's one thing to say "I
16 didn't have enough" versus "Hey, I want more." That makes it
17 seem like hey -- She doesn't say "I need more to make a
18 conclusion."

19 **THE COURT:** The one thing is I think this falls on
20 the plaintiff because to the extent you say that you did
21 transmit a request, you didn't bring it to the Court.

22 **MR. JORDAN:** That's fine. You know what, Your Honor,
23 we can withdraw that saying that we don't have the --

24 **THE COURT:** I'm sorry?

25 **MR. JORDAN:** We can withdraw that portion of her

1 testimony saying that we can't provide any -- Mr. Stern
2 doesn't recall it and I don't have anything that says that I
3 did it, other than recalling it orally so we withdraw that
4 portion of the--

5 **THE COURT:** So we can say the parties agree that
6 there was no indication that the defense was asked -- if this
7 is accurate -- for additional exemplars.

8 **MR. JORDAN:** I don't want to make this the issue.

9 **MR. STERN:** I think the way you worded it, Your
10 Honor, is probably the best way. I'd rather it come from you.

11 **MR. JORDAN:** Your Honor, as long as you can indicate
12 that our recollection is different, but we can't be sure. So
13 it doesn't seem like I'm trying to pull something on the jury
14 either.

15 **THE COURT:** So I don't want to misstate what you're
16 willing to have me say, so --

17 **MR. JORDAN:** We can try to come up with a
18 stipulation over lunch. Let's do it after lunch.

19 **THE COURT:** I don't think it matters that it has to
20 be this minute.

21 **MR. STERN:** Well, that's lingering out there.

22 **THE COURT:** I'm sorry?

23 **MR. STERN:** It's lingering out there. I'd rather have
24 it addressed.

25 **THE COURT:** Well, we already gave them their recess

1 so I think -- I don't really want to take a break at 12:30.

2 **MR. GAGLIARDO:** Your Honor, I need to use the men's
3 room, if we're going to break sometime soon for lunch or
4 otherwise. I just need to know.

5 **THE COURT:** I normally break at 1.

6 **MR. GAGLIARDO:** At 1? I want to be respectful.
7 We're good.

8 **THE COURT:** Can we come up with something then now?
9 The parties agree that -- well, I don't want to. You tell me
10 what you want me to say.

11 **MR. JORDAN:** That the defense has no recollection of
12 it being requested.

13 **MR. STERN:** That doesn't sound right.

14 **THE COURT:** There's no indication -- the parties
15 agree that -- there's no indication that the request was made
16 to defense counsel; is that right?

17 **MR. STERN:** For additional samples.

18 **MR. GAGLIARDO:** Judge, may I be excused for a moment
19 while Mr. Jordan continues?

20 **THE COURT:** I don't want to put words in anyone's
21 mouth. The parties agree that there was no indication of -- I
22 was going to say of a request to the defense, not defense
23 counsel or defendant, but to the defense for additional
24 samples, handwriting samples.

25 **MR. GAGLIARDO:** Did both parties agree to the 20?

1 How did you get to 20?

2 **MR. JORDAN:** That was what Compass provided.

3 **MR. STERN:** My understanding from our expert--

4 **MR. GAGLIARDO:** Both parties accepted that there
5 would be 20. One expert is going to say --

6 **THE COURT:** The parties agreed to just 20 samples.
7 We could say that.

8 **MR. JORDAN:** Yeah.

9 **MR. STERN:** We can say that. I remember this was
10 what our expert asked for, we provided, we provided the same
11 set --

12 **MR. JORDAN:** The parties agree.

13 **MR. STERN:** We provided the same set.

14 **THE COURT:** But the parties agree that there was an
15 agreement to provide 20 samples.

16 **MR. STERN:** Right. But I want to make -- like there
17 was no -- it's suggesting that again, I'm withholding
18 something.

19 **THE COURT:** Right.

20 **MR. GAGLIARDO:** But the parties agreed there's no
21 suggestion.

22 **THE COURT:** But the parties agreed to provide 20
23 samples to the --

24 **MR. STERN:** Right.

25 **THE COURT:** --to the opposing expert.

1 **MR. STERN:** But that's also what was provided to our
2 expert.

3 **THE COURT:** Right.

4 **MR. JORDAN:** And he came to a conclusion.

5 **THE COURT:** The parties agreed that each expert
6 would be provided with 20 handwriting samples.

7 **MR. STERN:** I think with that additional statement
8 because it still suggests she asked for more and we would not
9 give it.

10 **MR. JORDAN:** No, it's not.

11 **MR. GAGLIARDO:** I'm going to stay out of it.

12 **MR. JORDAN:** I just think the parties agree that --

13 **THE COURT:** --each side would provide 20 samples.

14 **MR. JORDAN:** Right. And I would just move on.

15 **THE COURT:** Right. I think that's fair because that
16 answers why you only had 20.

17 **MR. JORDAN:** Okay.

18 **MR. STERN:** Okay.

19 **MR. JORDAN:** Thank you, Your Honor.

20 **MR. GAGLIARDO:** May I be excused for a moment, Your
21 Honor?

22 **THE COURT:** Yes.

23 **(Counsel returned to their trial tables.)**

24 **THE COURT:** Members of the jury, I just want to
25 explain to you that the parties agreed that each side would

1 provide 20 handwriting samples. Is that not right?

2 **MR. JORDAN:** They were the ones -- they provided all
3 the samples. We provided Q, the questioned document. They
4 provided all the samples.

5 **THE COURT:** Right. So let me see you back up here.

6 **(Counsel approached the bench.)**

7 **MR. STERN:** The sequence of events was we had our
8 expert first. You remember there's one that was --

9 **THE COURT:** Right, I do. I let you substitute.
10 Another ruling in your favor.

11 **MR. JORDAN:** You just said that the parties provided
12 the samples. We didn't provide any.

13 **THE COURT:** You didn't have to.

14 **MR. JORDAN:** We didn't have any samples.

15 **MR. STERN:** So it's agreed that 20 samples would be
16 provided --

17 **THE COURT:** By the defense.

18 **MR. STERN:** Yes.

19 **MR. JORDAN:** You said both of them were doing it.

20 **THE COURT:** Right, but it was to opposing experts.

21 **MR. JORDAN:** Right, opposing experts.

22 **MR. STERN:** Couple of things. Let's back up for a
23 second. The sequence of events was we retained an expert. She
24 was in rebuttal and then she was responding to -- and we had a
25 rebuttal to a rebuttal and then everyone was working within

1 that 20 of what the analysis was. So along those lines as
2 long as it's accurate, but it's like well, we picked 20 and
3 rejected -- I don't want it to be suggested that we're
4 rejecting some offer or request for more.

5 **MR. JORDAN:** That's what we just arrived at.

6 **MR. STERN:** I know, that's what I'm saying. I don't
7 think it sounds that good.

8 **THE COURT:** So the parties agreed -- is it that the
9 defense would provide 20 samples?

10 **MR. JORDAN:** Right.

11 **THE COURT:** Of Mr. White's handwriting; is that
12 accurate?

13 **MR. JORDAN:** Right.

14 **MR. STERN:** That makes it sound like we're limiting
15 it somehow.

16 **MR. JORDAN:** No.

17 **MR. STERN:** We didn't.

18 **THE COURT:** No, because 20 is the norm.

19 **MR. STERN:** Yes. And I'll get that in
20 cross-examination.

21 **THE COURT:** So then --

22 **MR. STERN:** I don't know if she will agree with it.

23 **THE COURT:** Well, she said it.

24 **MR. STERN:** She did say it.

25 **MR. JORDAN:** Okay.

1 **THE COURT:** So is that okay, the parties agree that
2 the defense was to provide 20 handwriting samples which they
3 did.

4 **MR. STERN:** Right. And can I just put it in context
5 is it appropriate to give the reminder to the jury that she
6 did point out that's the norm?

7 **MR. JORDAN:** What?

8 **THE COURT:** No, she already said it and you're going
9 to, I'm sure, bring it out on cross.

10 **MR. STERN:** Thank you, Your Honor.

11 **MR. JORDAN:** I didn't hear what she said.

12 **THE COURT:** Why don't you wait here in case it's not
13 right.

14 **(Counsel returned to their trial tables.)**

15 **THE COURT:** Members of the jury, counsel agree that
16 the defense was asked to provide 20 samples and that's what
17 was provided. Thank you. Okay, you can continue.

18 **BY MR. JORDAN:**

19 Q. I think you mentioned comparability?

20 A. Yes, sir.

21 Q. What do you mean by comparability?

22 A. So as I was explaining that you need same letters and
23 letter combinations. The way Mr. White writes his illegible
24 name, it's a very broad range. So when I was trying to look
25 at similarities and differences in the questioned -- in the

1 questioned signature, I found multiple similarities and I
2 found some things that were not present. So basically my
3 opinion was either Mr. White wrote his own name or a second
4 person wrote his name. But the problem with that theory is
5 that there were very subtle handwriting characteristics that
6 were repeated in the known writing and the questioned. So
7 that's why I'm at a no conclusion because I think he could
8 have done it, I think someone else could have done it, but
9 there's no way to definitively note that.

10 Q. Okay. Noah, can you bring up chart one? Can you describe
11 the range of variation in Mr. White's signature?

12 A. Yes. Can I touch this and have it work? I'm sorry, can
13 I touch this screen and have it work?

14 **THE COURT:** The screen doesn't have it. There we go.

15 **THE WITNESS:** So that's not what we need.

16 **BY MR. JORDAN:**

17 Q. There you go. So is this a chart out of your report?

18 A. It is.

19 Q. And it's in the same -- it's the same reflection of the
20 chart that appears in your report?

21 A. Yes, sir.

22 Q. Okay.

23 **MR. STERN:** I think there are arrows that I don't
24 see in the report.

25 **THE WITNESS:** It's the surrebuttal report.

1 **BY MR JORDAN:**

2 Q. What page of your report is this on?

3 A. It's on the surrebuttal report.

4 **MR. STERN:** Your Honor, can we approach?

5 **THE COURT:** Okay.

6 **(Counsel approached the bench.)**

7 **MR. STERN:** I asked if there was a rebuttal report
8 and I was told no.

9 **MR. JORDAN:** There was no rebuttal report that was
10 provided. It was a -- the fact that she has arrows on it, I
11 don't think that makes it a different report. This is in
12 her--

13 **MR. STERN:** Rebuttal report.

14 **MR. GAGLIARDO:** Mr. Wolf is looking for the slides
15 in the first report. I think the only difference is as you
16 said, there are some arrows on these examples.

17 **MR. STERN:** Is this part of an analysis that she has
18 not done before?

19 **MR. GAGLIARDO:** It's the same analysis. She's just
20 pointing out with more specificity.

21 **MR. STERN:** Same analysis with more specificity?

22 **MR. GAGLIARDO:** She'll explain her report. There
23 you go, Judge, right there.

24 **THE COURT:** It's right there.

25 **MR. STERN:** There are not arrows on it and she's

1 talking about rebuttal.

2 **MR. GAGLIARDO:** I'm saying that I think --

3 **THE COURT:** One at a time.

4 **MR. STERN:** I think this sounds like it's a
5 supplemental analysis to what we received.

6 **MR. JORDAN:** Arrows are not a supplemental analysis.

7 **MR. STERN:** But I have a feeling she's going to be
8 talking in detail now beyond what we've seen. That's what I'm
9 concerned about. I thought you had blow-ups of what was on
10 there and maybe they are, but the arrows are not part of this
11 and I think there's an additional analysis that we've not been
12 privy to.

13 **THE COURT:** Did you depose her?

14 **MR. STERN:** No, we did not. I asked for it, but we
15 were --

16 **MR. JORDAN:** No, you did not ask. You did not ask
17 for her deposition. She didn't prevent you from taking her
18 deposition.

19 **THE COURT:** I did or Judge Copperthite?

20 **MR. STERN:** No, you did not.

21 **THE COURT:** I mean, if you had attempted to in a
22 timely manner I can't understand how you wouldn't have been
23 able to, so that's why I asked the question. There's been so
24 much haggling over discovery in this case. So I'm not sure
25 what the issue is. You're saying there's some new report?

1 **MR. STERN:** That's what it sounds like when she said
2 a rebuttal report.

3 **THE COURT:** Well, this looks like it was in the
4 report, but they're not in the same way because it doesn't say
5 "pen lift/hiatus."

6 **MR. STERN:** Right. And that's what I'm concerned
7 about. This was not part of her analysis because I remember I
8 went over this at length with my expert trying to understand
9 things to ask and what not to ask. And there's no analysis of
10 pen lifts or anything like that.

11 **MR. GAGLIARDO:** I believe it's correct to say that
12 all that chart does that the paper chart does not is add the
13 title and then insert the arrows which she could testify to
14 anyhow.

15 **MR. STERN:** But that's not in her --

16 **MR. GAGLIARDO:** It is in the report. She said "I
17 looked at these, I found pen lifts" or whatever it is.

18 **MR. STERN:** I would like to know where in her report
19 does it say that.

20 **MR. GAGLIARDO:** How do you think she came to the
21 conclusion that she did?

22 **MR. STERN:** The pen lifts and the hiatuses. I don't
23 remember seeing that in her report and I'd like to know where
24 in her report it says that.

25 **THE COURT:** So I guess my concern is this:

1 Typically reports don't come into evidence and the witness
2 just testifies and you have to provide the report. But I
3 don't know that it bars them from asking something that's not
4 in the report. I'm just trying to look it up.

5 **MR. STERN:** I guess what I'm concerned is is there
6 some additional analysis that I did not see. That's what I'm
7 concerned about.

8 **THE COURT:** Can you proffer for us what you think
9 she's going to say? Is it consistent with her report?

10 **MR. STERN:** There's nothing in the report that talks
11 about pen lifts and hiatuses and that's my point.

12 **THE COURT:** Well, I don't know what that means.

13 **MR. STERN:** That's my concern.

14 **MR. GAGLIARDO:** The essence of her testimony is as
15 she's testified, she couldn't make a conclusion because, and
16 she will break that down.

17 **MR. JORDAN:** Variations on the signature.

18 **MR. GAGLIARDO:** Right. She'll break that down and
19 she'll point to the various exemplars and say "On this
20 exemplar, this is what I've found."

21 **MR. STERN:** If this is allowed, then I should be
22 able to point out that these are not part of her report
23 because she does not say there's pen lifts. She does not talk
24 about hiatuses in her report. That's fine. I mean, it's not
25 fine. If that's something that's allowed in then I should be

1 allowed to point that out in her report.

2 **THE COURT:** I'm just trying to look at Rule 26 and
3 see if there's anything that requires her -- limits her
4 testimony to -- I mean, you have to get the report and you
5 did.

6 **MR. STERN:** I did, but the report does not discuss
7 pen lifts and hiatuses, it discusses quality, variation, and
8 there's a third.

9 **MR. JORDAN:** Comparability.

10 **MR. STERN:** Comparability. I don't remember -- there
11 may be -- there's a brief discussion, very brief in
12 comparability. I don't think it goes into that detail, it just
13 -- we can look at it, it's right there.

14 **MR. GAGLIARDO:** If I may, Judge, the expert simply
15 said, "Here's my conclusion: It's not John White's signature,
16 it is John White's signature" and did nothing more. Produced
17 that report and then the party, the opposing party doesn't
18 take a deposition to find out what's more, that failure to
19 take the deposition can't preclude the proposing party's
20 expert testimony.

21 **THE COURT:** So Rule 26 -- I just want to make sure I
22 have every number right because it's such a long rule. But 26,
23 I think it's (e), supplementing disclosures and responses:
24 Expert witness will be (e)(2). For an expert whose report must
25 be disclosed under Rule 26(a)(2)(B) the party's duty to

1 supplement extends both to information included in the report
2 and to information given during the expert's deposition. Any
3 additions or changes to this information must be disclosed by
4 the time of the party's pretrial disclosures under Rule
5 26(a)(3) when they're due. But I don't know that this is
6 different, so that's my concern.

7 **MR. STERN:** Well, I think if we look at the
8 comparability section of her report --

9 **THE COURT:** I mean, I've never seen -- read the
10 report, so I don't really know.

11 **MR. STERN:** So the first part is on quality and
12 that's not at issue here. Then it's range which is not at
13 issue, and comparability --

14 **MR. JORDAN:** I can go through this. You know what,
15 we're going to go through her report. If you want to object,
16 object. We will go through her report.

17 **MR. STERN:** Okay, we'll go through the report.

18 **THE COURT:** Go through the report. The report is not
19 an issue.

20 **MR. STERN:** That's right.

21 **THE COURT:** Okay.

22 **(Counsel returned to their trial tables.)**

23 **BY MR. JORDAN:**

24 Q. Turn to page 4 of 5. Ms. Eisenberg, there is a chart --
25 hold on, come down a little bit, Noah, so we can see the

1 title. The other way, other way. This is in the comparability
2 section of Exhibit 18. It's page 4 of 5. And there is a chart
3 up on your screen. Can you show the chart now, Noah? And then
4 there are K6, K10, K15, okay?

5 A. Yes, sir.

6 Q. And that is comparing that to the original. Can you tell
7 me what you were identifying in each of these circled items?

8 A. Yes, sir. So can you raise it up just a little bit?

9 Thank you. So in the boxes entitled K6, K10, and K15, they
10 were all written by Mr. White. Yet if you look at the area
11 that's circled, there's very little comparability amongst
12 those three signature samples.

13 Q. What do you mean by that?

14 A. I mean that Mr. White has a very broad range of variation
15 in his writing which means that the questioned signature could
16 fall within that range, but there is so much variation that
17 some of the features that are in the questioned signature are
18 not there, are not there. But if I took, for example, Exhibit
19 15 and compared it to the remaining known, I wouldn't be able
20 to say that that was also written by Mr. White. So that's what
21 I mean by comparability and variation. His variation is so
22 wide that you need a lot more knowns in order to be sure that
23 you have the complete span of his variation in his writing.

24 Q. This -- now I notice in K15 there appears to be a break
25 between letters. What is that called?

1 A. It's called a pen lift.

2 Q. Okay. And with regard to K10, there is -- within the
3 circle there appears to be some action in there, is it at the
4 end? Is that what we're looking at there?

5 A. Well, there's another pen lift in that one, but in a very
6 different location.

7 Q. Okay, where is that?

8 A. So right after the J -- can I -- will this -- yeah, it
9 will work.

10 **THE COURT:** You can write on the screen, actually.

11 **THE WITNESS:** Thank you, with just my finger?

12 **THE COURT:** I'm sorry?

13 **THE WITNESS:** With my finger?

14 **THE COURT:** Yes.

15 **THE WITNESS:** So --

16 **MR. JORDAN:** May I approach, Your Honor? May I
17 approach, Your Honor?

18 **THE COURT:** Yes. Well, we as far as I know we use
19 our finger.

20 **THE CLERK:** You can use your finger to draw.

21 **MR. JORDAN:** I was trying to be helpful.

22 **THE WITNESS:** If you can see where I was trying to
23 point after the J there's a pen lift.

24 **THE COURT:** If you want to use the pen as a pointer,
25 that's fine. I didn't want you to use the pen on the screen.

1 I'm sorry.

2 **THE WITNESS:** Yeah, okay. So that's a pen lift in a
3 completely different location than the one in K15. K stands
4 for known. And then in K6 just the entire area that has been
5 circled, literally the J is legible and nothing else is
6 legible. And the illegibility of all three of those samples
7 are very different from one another, yet we know one person
8 wrote it. And that's what I had to work with when I was
9 comparing the questioned signature with the known. Very broad
10 range of variation.

11 Q. Okay. Taking a look -- moving on, Noah. Come up to the
12 signatures. Now we have -- we have Q1 here?

13 A. Yes, sir.

14 Q. And that is the blown up signature on Exhibit 8 or the
15 severance agreement; is that right?

16 A. Yes, sir.

17 Q. Okay. And then below that you have some examples. Can you
18 explain to me -- first off, do you know what a striation is?

19 A. Yes, I do.

20 Q. What is that?

21 A. So when you're using a ballpoint pen, the way the
22 ballpoint pen is you have a reservoir that's a tube inside the
23 pen and it's a reservoir of ink. And the ball -- which is why
24 it's called a ballpoint pen -- rotates and picks up ink as you
25 write. Sometimes the pen, the ball does not pick up ink and so

1 you'll have what's called striations. And it's not a full
2 coverage of the ink line. That's just something that often
3 happens when using a ballpoint pen. So striations are when it
4 looks -- well, you know, this example is really hard to see,
5 but there are striations in the questioned signature.

6 Q. Are there striations in any other signatures?

7 A. Not that I notice, no.

8 Q. Okay. And then with regard to looking at the pen drag, do
9 you know what pen drag is?

10 A. Yes. I discussed pen drag with the jury, yes.

11 Q. Okay. And is there -- are there any examples within the
12 exemplars of pen drag?

13 A. Not really. But you know, again, these are reproductions
14 and they're poor quality reproductions, so I would not expect
15 to see pen drags because those are light features like pen
16 movements that are rarely picked up this far down the line of
17 reproductions.

18 Q. Okay. And then patching, what is patching?

19 A. Patching is when you write and then after you're done
20 writing, you go back and you try and fill in some areas. So
21 there is some patching in Exhibit Q1, but there's also
22 patching in the known exemplars as well. So this might just
23 be a habit of Mr. White.

24 Q. Can you look at K2, K3, and K5 on this sheet and tell me
25 if there's any patching?

1 A. Yes.

2 Q. Okay. Where would that be?

3 A. So in the second character -- let's see if I can get
4 this--

5 Q. Are you talking about --

6 A. K3.

7 Q. K3? Okay.

8 A. Yeah. There's a lot of pen movement going on where I've
9 just put the poor rendition of an arrow. But there's a lot of
10 pen movement going on there. It's not a single pen movement,
11 so it's patching or it's some other kind of movement going on.

12 Q. When I think of patching it's like I write something and
13 then I touch it up. Is that what it is?

14 A. Yes.

15 Q. And so you see that in -- do you see that in K2, K3, and
16 K5?

17 A. Yes. Again, in K5 in particular I'm going to circle that.
18 There's a lot of extra pen movements in that letter form.

19 Q. Is there any patching in Q1, the questioned document?

20 A. Yes.

21 Q. Where is that?

22 A. Here there's some patching there.

23 Q. Okay, so that's something that's repeated in the
24 exemplars along with the questioned document?

25 A. Exactly, yes.

1 Q. Okay. Taking a look at K6 and K9 and the questioned
2 document, can you tell me is there any relationship first off
3 with K6 with regard to angular movements?

4 A. Yes. Now is it possible to get rid of --

5 **THE COURT:** Do you want to clear the markings?

6 **THE WITNESS:** Yes, that's what I'm asking. Okay,
7 thank you. I'm sorry, so we're talking about angular?

8 **BY MR. JORDAN:**

9 Q. Angular movements.

10 A. So in the questioned signature, the top of -- there are
11 some angular movements.

12 Q. What does that mean?

13 A. So right here at the top of the J is a point. Here at the
14 top of whatever this letter is there's a point. So there's a
15 couple of sharp angles. But when we look at the knowns we see
16 plenty of sharp angles as well. So just with what we have on
17 the screen right here, the top of this J is pointed and K3,
18 this letter is pointed. If you go down there's lots of
19 examples of pointed areas. Well, in K5, this right here and in
20 K6 you have a point at the top of the J, you have pointed
21 here. If you keep going down there's plenty of areas that are
22 pointed. Like in K8, the J, this character right here,
23 they're very angled. In K7, again, it's very angled.

24 Q. But there are also exemplars where it doesn't occur; is
25 that right?

1 A. That is right, yes.

2 Q. So it's difficult to come to a conclusion?

3 A. It is.

4 Q. What is hesitation tremor?

5 A. Hesitation or tremor is when -- so for example --

6 **MR. STERN:** Your Honor, may we approach?

7 **THE COURT:** I'm sorry?

8 **MR. STERN:** May we approach, please? It's also a
9 little after 1. Sorry for interrupting.

10 **THE COURT:** I want to give Mr. Jordan the option of
11 deciding if this is a good breaking point. I don't want to
12 interrupt your flow.

13 **MR. JORDAN:** I'm trying to move through, Your Honor.
14 There's a limited amount that we have left.

15 **THE COURT:** Limited?

16 **MR. JORDAN:** Yes.

17 **THE COURT:** Okay, so if the jury can bear with us,
18 then let's keep going.

19 **MR. JORDAN:** Yes.

20 **BY MR. JORDAN:**

21 Q. So I think we were talking about hesitation tremor?

22 A. Yes. So it's when you are writing and either you're not
23 sure what to write next so you kind of like hesitate and then
24 you resume or -- so in this case there's a hesitation mark
25 where I just put the circle. But that could also have been the

1 cause of an uneven writing surface or a faulty pen movement.

2 So it could be -- it could be that it's a hesitation, it could
3 be a fault on the surface of the paper. Again, I can't know
4 that which is a reason why I have a no conclusion for an
5 opinion.

6 Q. If you could, there's a -- where does the -- on the Q1,
7 where does the J start?

8 A. J starts right here.

9 Q. Okay. Are there any other examples where the J starts in
10 a similar area?

11 A. Yes, there are. There are plenty.

12 Q. Okay.

13 A. If you -- well, let me just -- I have those numbers. So
14 if we go to the end of the chart where it's Exhibit 15, okay,
15 so we have that same starting point right here and right here
16 and I think there's more on the next page. Yes. And right
17 here. So all of those have the same starting point as the J in
18 the questioned signature.

19 Q. Okay. Oh here we go, okay. Go down to the end of the
20 report, K -- it should be page 56. Okay. Now bring that up a
21 little bit. No, the other way, I'm sorry. These are signatures
22 where you were advised that John White just wrote his
23 signature?

24 A. Yes, sir.

25 Q. On a page. So can you tell me how these signatures

1 compare?

2 A. To the questioned signature?

3 Q. Yeah.

4 A. I would say they're very different, but I would have to
5 say dissimilar because different would say a different writer,
6 but dissimilar we know that it's the same writer, but the
7 variation of these signatures compared to many of the others
8 that were provided is just drastically diverse. And I would
9 say that if any one of these signatures was the questioned
10 signature and you compared it to the rest of the known, you
11 wouldn't be able to say it's the same person.

12 Q. So these signatures here, had these been the Q1 you would
13 not have been able to make any better conclusion than with
14 regard to Q1 versus the other numbers?

15 A. That's exactly right.

16 Q. Right, okay. And that is why?

17 A. Because the variation is so wide. He has such -- so many
18 different versions of his signature.

19 Q. And go back to the beginning of the chart, Noah, please.
20 And I apologize if I have done this already, but I want to
21 make sure I don't miss it. Did we discuss the pointed top?

22 A. Well, partially, yes.

23 Q. Can you explain the part you didn't explain?

24 A. Yes. So if we look at K1, so we're talking about this
25 pointed top of the letter J. And then in K1 we also have a

1 pointed top. If you look at K2 it's more rounded, but if we
2 look at K6, you can move the chart, K6, it's pointed. And K8,
3 down here it's pointed. And K11 which is on the next page.

4 **THE COURT:** What about K7?

5 **THE WITNESS:** Go back. Yes, that's pointed as well,
6 yes. There's many pointed Js. And am I permitted to reference
7 the opposing expert?

8 **MR. JORDAN:** In terms of --

9 **MR. STERN:** Your Honor, can we approach?

10 **MR. JORDAN:** I don't know what she means.

11 **MR. STERN:** Can we approach?

12 **THE COURT:** Okay.

13 **(Counsel approached the bench.)**

14 **MR. STERN:** Who is she talking about? Because we
15 asked whether she was doing a report of Jeff Payne's and we
16 were told no. So is she referring to Mr. Baggett's report? We
17 asked specifically about Jeff Payne after Your Honor's ruling
18 about that, so I don't know who --

19 **MR. JORDAN:** I'm not going to have her discuss the
20 rebuttal to Mr. Payne's report.

21 **THE COURT:** How much longer? Because I think I need
22 to give --

23 **MR. JORDAN:** Five, six minutes, I think.

24 **MR. STERN:** But she's asking whether she can
25 reference --

1 **THE COURT:** He said he's not going to ask her.

2 **MR. JORDAN:** Let's take a break now and we'll just
3 finish up and we won't talk about Mr. Payne's report.

4 **THE COURT:** Okay.

5 **MR. JORDAN:** Thank you, Your Honor.

6 **(Counsel returned to their trial tables.)**

7 **THE COURT:** Members of the jury, I don't want to
8 starve you so I'm going to let you have your luncheon recess
9 now. By the way, if you haven't noticed, on the first floor
10 there actually is an eating establishment. I don't know if
11 you've seen it, but if you want to stay in the building,
12 that's an option. Of course you're free to roam around, but I
13 always have to remind you that you may not discuss the case
14 with anyone or allow anyone to discuss the case with you and
15 you must continue to keep an open mind about the case. Why
16 don't we ask you to return in an hour, so that would be 10
17 after 2 and we should be ready by 2:15. Make sure everybody is
18 back on time and we'll get started.

19 So also the witness, of course, while you're on the stand
20 you can't discuss your testimony with anyone or allow anyone
21 to discuss the case with you.

22 **THE WITNESS:** Yes, ma'am.

23 **THE COURT:** Thank you. We're all in recess.

24 **(Recess was taken from 1:12 to 2:14 p.m.)**

25 **THE COURT:** Okay, before we get started I just want

1 to mention that at the luncheon break I did go back to my
2 memorandum opinion addressing the -- at ECF 160, March 31 of
3 2023 addressing the Motions in Limine and refreshed my memory.
4 It was there that I discussed the Adams Employment Agreement,
5 but the issue wasn't actually presented to me about whether
6 his testimony was admissible. I know we already addressed it,
7 but I just wanted to point it out.

8 On page 6 of the opinion I noted that the metadata for
9 the draft agreement indicated that John White created and
10 edited the document on May 22nd of 2007 citing ECF 138-3, and
11 the metadata also showed the title, Adams Employment
12 Agreement.

13 And then plaintiff asserted that at trial he intends to
14 call John Adams, a Compass employee who received substantially
15 the same employment agreement. And I cited ECF 138 at 6. And
16 according to the plaintiff, Adams signed that agreement on or
17 about May 2, 2007. So that's almost around the same time as
18 Mr. Boshea's agreement. It's really about a month before. And
19 that was from ECF 119-3 at 36. Yes, the amount of the proposed
20 severance was less for Mr. Adams than for plaintiff and the
21 defendant maintained the Adams Employment Agreement was not
22 authentic. And that's what I had said about it and I was not
23 presented with a question about it, it was an assertion by
24 plaintiff that plaintiff intended to call John Adams.

25 And certainly if there were someone to address what

1 metadata means, the fact that the document at issue was
2 adapted from Mr. Adam's agreement would seem important.

3 **MR. JORDAN:** The metadata issue was a different
4 exhibit.

5 **THE COURT:** I'm sorry?

6 **MR. JORDAN:** The metadata issue was a different
7 exhibit.

8 **THE COURT:** No, I know. But I'm saying that was the
9 forwarded e-mail.

10 **MR. JORDAN:** Right.

11 **THE COURT:** But there's been an objection to the
12 reference to metadata without an expert. And that was -- from
13 the defense. And so you weren't even using that forwarded
14 e-mail exhibit. That's a different issue.

15 **MR. JORDAN:** Correct.

16 **THE COURT:** But it also had to do with metadata. So
17 I was just pointing that out in case anybody thought it was
18 relevant.

19 **MR. JORDAN:** Okay.

20 **THE COURT:** Okay, are we ready for the jury?

21 **MR. JORDAN:** Yes, ma'am.

22 **MR. STERN:** Yes, Your Honor. I didn't know whether
23 we need to introduce ourselves for the record to start.

24 **THE COURT:** No, it's the afternoon. It's the same
25 day. Only at the beginning of every day.

1 **MR. STERN:** I couldn't remember. All the days blur
2 together.

3 **THE COURT:** Well, the days seem long that's why you
4 thought we needed to do it again.

5 **(The jury reentered the courtroom at 2:23 p.m.)**

6 **THE COURT:** Okay, counsel, whenever you're ready.

7 **BY MR. JORDAN:**

8 Q. Ms. Eisenberg -- Noah, can you show Ms. Eisenberg K11,
9 right there, and then K -- the Q1 which is the questioned
10 document. And then what I want you to tell us if there is an
11 instance where in both of those signatures where the down
12 stroke stops.

13 A. Yes, sir.

14 Q. Okay, so Q1 and K11. First off, what does it mean to have
15 the down stroke stopped?

16 A. So most of Mr. White's Js terminate. It goes down past
17 the baseline and then curves up to the right. It doesn't
18 always happen that way. In exhibit K11, K11 you can see the
19 same stopping where I circled. So where he routinely turns to
20 the right and upward, he doesn't always do that. And once
21 again, this is something that might show up more often in more
22 exemplars, but it does show up in this set of exemplars.

23 Q. Okay.

24 A. So it's a similarity.

25 Q. And then what -- when you say there's a U formation, what

1 does that mean?

2 A. So if we look at the questioned signature, this movement
3 here is somewhat like a U formation. It might be part of the W
4 formation for White, but again, it's illegible so that's the U
5 formation. But if we go down to K2, you don't see that here.
6 It's a variation. If we look at K3, we don't see it at all in
7 there. And K4, it's not there either. But if we go to K15, we
8 get that same movement. So it's there. It's repeated in the
9 known writing.

10 Q. Okay. And then what is it -- when you say that the E
11 sometimes has an eyelet the size of which varies, what is
12 that?

13 A. Okay. So if we go up to the top to the questioned
14 signature, this is the E formation which is a very large loop
15 formation. The thing is Mr. White's Es are all over the place.
16 So if we look at K2, you can see it's smaller and if we look
17 at K4 you don't see it at all. It doesn't exist at all. K5
18 it's a completely different formation. It's flat on the top,
19 not angled. K10 -- can you get rid of the --

20 **THE COURT:** Yeah. Clear it, please.

21 **THE WITNESS:** Thank you. Again, it's a completely
22 different formation than what we've seen in everything I've
23 just mentioned. K11, again, very different from every other
24 formation we've looked at. K14, can you go down a little bit,
25 please? And again, if you could delete the circles that I

1 have. Thank you. This is also completely different from all
2 the other ones that we've seen.

3 Q. Is that unusual that it goes below the line there for Mr.
4 White?

5 A. Well, we don't see it in any others, yes. But like I
6 said, he's got a very wide range of variation and for
7 everything you see, you also see things that you never see
8 again like in 14A. And if we look at 15, so right here, very
9 different. No E formation whatsoever. And keep going down,
10 please. And again, these Es you would never know that they're
11 Es. And so the question is does the ones that are in the
12 questioned signature fall within the range of variation of the
13 known signatures? You can't tell because there's just so much
14 variety. And as I mentioned before, in 15E I don't see that
15 anywhere else. So if that were the questioned signature could
16 we eliminate Mr. White as the writer? No, we can't.

17 Q. And the reason we can't is only because we know it's his
18 or something else?

19 A. That's the only reason we know, yes.

20 Q. If you didn't know you couldn't know is what you're
21 saying?

22 A. That's exactly what I'm saying, sir, yes.

23 Q. Meaning it's inconclusive?

24 A. Yes.

25 Q. Okay. What is relevant slant?

1 A. Slant refers to so if you have the drawn or imagery line
2 upon which the writing rests, some people write on that line,
3 some people write above it, some people angle it down, angle
4 it up. If you go to the top with the questioned signature --

5 **MR. STERN:** Can I just ask a point of clarification?
6 What document are you -- what paper document are you holding?

7 **THE WITNESS:** It's charts that I wrote.

8 **MR. STERN:** Are those charts in your October 11,
9 2021 report?

10 **THE WITNESS:** No.

11 **MR. STERN:** Can we approach, Your Honor?

12 **THE COURT:** Okay.

13 **(Counsel approached the bench.)**

14 **MR. STERN:** I've not seen this.

15 **THE COURT:** I don't know what it is.

16 **MR. STERN:** She says she's looking at other charts
17 that are not in her report.

18 **MR. JORDAN:** She's using it to reference numbers as
19 far as I can tell. I'm asking her about her report.

20 **THE COURT:** He's not asking about the reports.

21 **MR. STERN:** She's looking at charts. She just said
22 she's looking at charts that are not in her report.

23 **THE COURT:** Well, I don't know that she said they're
24 not in her report.

25 **MR. STERN:** I just asked her are those in your

1 October 11, 2021 report and she said no.

2 **MR. GAGLIARDO:** We're back to what happened before.
3 They're the same charts. One with arrows, one without,
4 whatever markings --

5 **MR. STERN:** But you don't want to see them--

6 **THE COURT REPORTER:** I can only take down one person
7 at a time.

8 **THE COURT:** I'm sorry. Okay, one at a time. So I
9 don't know what she's looking at.

10 **MR. JORDAN:** I won't have her use any report or
11 anything else.

12 **MR. STERN:** There was a supplemental report. I'm
13 sorry. Go ahead, Greg, finish.

14 **MR. JORDAN:** I'll just move on.

15 **THE COURT:** Well, is there a supplemental report?

16 **MR. STERN:** I'm going to ask that on cross. I have
17 to.

18 **THE COURT:** Yeah, I agree with you.

19 **MR. JORDAN:** Okay, she can give it to you if she has
20 anything.

21 **MR. STERN:** It sounds like there is. We never saw
22 it.

23 **MR. JORDAN:** I'm not presenting it. I told you, I'm
24 not presenting her supplemental report.

25 **THE COURT:** Did you have one and not turn it over?

1 **MR. JORDAN:** I think that we had one and forgot to
2 turn it over and so we're not using it. That is because it
3 would be unfair, you know, in my mind and I'm not having her
4 use --

5 **THE COURT:** That's a big thing to forget.

6 **MR. JORDAN:** What?

7 **THE COURT:** That's a big thing to forget.

8 **MR. JORDAN:** I know it is.

9 **MR. STERN:** And the law requires disclosure of all
10 the reports and analyses.

11 **MR. GAGLIARDO:** They're not substantively different.
12 I think the supplemental is more -- the second report includes
13 criticisms of their expert. That's the major difference.

14 **MR. STERN:** I'm going to refer to my rule expert if
15 I may, Your Honor. She's great on the rules.

16 **MS. HAYDEN:** I was just going to say Rule 26.

17 **THE COURT:** Well, just citing Rule 26 doesn't help
18 me.

19 **MS. HAYDEN:** Rule 26 requires all opinions and facts
20 that were used to create those opinions.

21 **THE COURT:** To what end? In other words, is the
22 remedy that she not use it? Because I agree that under Rule
23 26 obviously this just fell on me so I have no preparation,
24 but my understanding of Rule 26 is that the parties are
25 required to provide supplemental reports. But what's the

1 remedy or what's the sanction if you will for the failure to
2 do it if they don't use it? And she isn't --

3 **MR. STERN:** She is.

4 **THE COURT:** No, I understand she is, that's also her
5 work product. But I don't know what it says so I don't know
6 if it's any different or if it's just --

7 **MR. STERN:** Well then I'll ask her some questions on
8 cross-examination to understand what this is and that document
9 has to be -- we have to make sure we -- I don't know what it's
10 dated, I have no idea.

11 **THE COURT:** I understand totally. The question I
12 have is if it doesn't say anything at odds with the first one,
13 for example, if it had more pictures or more --

14 **MR. STERN:** My concern, Your Honor, and the thing
15 we've been trying to grasp, grapple with as we've been
16 listening to this testimony, and I understand Mr. Jordan is
17 walking through her report, we understood that's what he's
18 doing. But I prepared a lot of my examination based on that
19 report and there's been no analysis of these pen drags,
20 hiatuses. There's none of this analysis that we're hearing in
21 her report and it sounds like she did a supplemental report
22 that points it out and shows these differences. And if that's
23 the case that she's referring to it, she's knowing hey, I
24 compared these three and --

25 **THE COURT:** Are you saying that what she said is not

1 consistent with her report?

2 **MR. STERN:** I'm just saying it's not in the report.
3 I'm just saying it's --

4 **THE COURT:** So are you saying that her testimony is
5 different from her report because she didn't address the
6 issues that she's now being asked about?

7 **MR. STERN:** That's true. Well, it seems that way to
8 me because there's no comparison. This K1 -- I'm making up
9 numbers, but K3, 5, and 10, whatever the numbers are. There's
10 nothing that connected those dots other than the three --
11 there's only three on right there and that's the only ones
12 where she called out specific numbers. She's referring to some
13 analysis it appears that's saying 6, 10, 12, 13 and I haven't
14 seen that. I have no idea what that is. And I'm just -- I'm
15 going off-the-cuff here because I've never seen this before.

16 **THE COURT:** Okay, well that's a problem. So first of
17 all, we should provide it. Even if you don't use it I think
18 that they should get a copy of it.

19 **MR. STERN:** This affects my preparation for my
20 cross.

21 **THE COURT:** I don't know if it does because I don't
22 know what's in it that's any different from what's already
23 been included in the original report, since I don't know
24 either one really.

25 **MR. STERN:** Well, I know -- I will tell you this,

1 it's not surprising that when I was preparing my cross I was
2 confirming with my expert to get guidance on things that I can
3 feel comfortable with doing and what I wanted to leave him to
4 take care of and it's based on this report. And it looks like
5 there's something else that's guiding this and that inhibits
6 me and limits my ability to prepare and understand what she's
7 going to be saying at trial. Because there is no detailed
8 analysis about this.

9 **THE COURT:** Of course at the end of the day her
10 opinion is inconclusive anyway.

11 **MR. STERN:** It is, I understand that. There's some
12 indication --

13 **THE COURT:** She's going through as I understand it,
14 reasons for why she couldn't make a conclusion.

15 **MR. STERN:** Well, I also think, Your Honor, while
16 we've been saying we don't know what's in there, it seems to
17 me this determination or analysis doesn't Your Honor and don't
18 we have to look at it in order to understand what we're even
19 talking about? Because right now we're guessing.

20 **THE COURT:** Yes, I think you do. And I didn't
21 quarrel with that.

22 **MR. JORDAN:** We'll make sure we'll provide that.

23 **MR. GAGLIARDO:** I think we've circled back to where
24 we were before which is that an expert can explain her opinion
25 and she can testify beyond the four corners of the report. And

1 that's all she's doing.

2 **MR. STERN:** When was this report prepared?

3 **MR. GAGLIARDO:** I don't know the answer.

4 **THE COURT:** The supplement.

5 **MR. GAGLIARDO:** The supplement, I honestly don't
6 know.

7 **MR. STERN:** This all seems relevant.

8 **MR. GAGLIARDO:** I can find out.

9 **THE COURT:** I'm going to have to send the jury for a
10 quick recess.

11 **MR. STERN:** I'm sorry for bringing this up, but I
12 just noticed she's reading from the page and I was like wait a
13 second, this doesn't look like the actual report.

14 **THE COURT:** Well, this may be a time where I
15 actually agree with you, Mr. Stern.

16 **MR. STERN:** Thank you.

17 **THE COURT:** It sounds like an issue we could have
18 avoided, that's for sure.

19 **(Bench conference ended.)**

20 **THE COURT:** Members of the jury, I know we just
21 started, but I'm going to give you a chance to take another
22 break while we hammer out some issues here. So rather than
23 keep you in the jury box, why don't you go back to the jury
24 room, refresh yourselves. Again, you must not discuss the
25 case and continue to keep an open mind and we'll let you know

1 when we're ready.

2 (Jury exited the courtroom at 2:38 p.m.)

3 (Conference resumed at the bench.)

4 THE COURT: So one possibility is to voir dire if you
5 will the expert on whether there's a supplement, whether it's
6 different from what she's already said, what is the
7 distinction between --

8 MR. STERN: I don't know at this point. I just
9 noticed she looks like she's toggling between two different
10 things.

11 THE COURT: But I think in general that Mr.
12 Gagliardo is right that it's not a script.

13 MR. JORDAN: What she's looking at is numbers.

14 THE COURT: But it does appear to me that there is a
15 supplement and if there is a supplement, it needed to be
16 produced and provided. And so whether there's actually any
17 real harm is another story. Because if it's not at odds with
18 what she said and just amplified somehow what she said, as
19 much as it's a violation of the rule it could be as we
20 sometimes say in the criminal cases, it's harmless error. It's
21 also what we say in criminal cases as plain error. But whether
22 it amounts to anything is all at this moment that I have to
23 worry about because I've got a jury in the box and a tight
24 schedule.

25 MR. STERN: And Your Honor, just the thing that I'm

1 most concerned about that I'm hearing without having the
2 benefit of seeing this --

3 **THE COURT:** Is that you're not prepared.

4 **MR. STERN:** That, and there's a specific correlation
5 pointing to A, B, C to indicate a pen lift, or a hiatus, or
6 something with points and I've never seen that before and
7 that's not in this report. And that's my concern.

8 **MR. GAGLIARDO:** If I may? This is a bit of a tempest
9 in a teapot. Your expert looked at everything and is going to
10 testify fully about everything and his testimony is not going
11 to change. And that's your refutation of whatever she says.

12 **MR. STERN:** Well, that is correct. There also is a
13 new analysis that she has to provide so I can prepare
14 accordingly and also I can then get guidance from my expert on
15 whether her analysis is right or wrong and whether he agrees
16 with it or not. That prepares my examination of him, it
17 prepares my examination of her. There's a lot to that. If I
18 don't know how she's connecting certain dots, no pun intended,
19 I keep saying I don't know.

20 **THE COURT:** Well, she gave very good explanations
21 that I think any layperson would understand. So I'm not sure
22 about that point that you just made about connecting the dots.

23 **MR. STERN:** She's pointing to specific samples.

24 **THE COURT:** Yes.

25 **MR. STERN:** And saying sample A, B, and C reflects

1 X. Samples, X, Y, Z represent Y. That's not been done.

2 **THE COURT:** That's not what?

3 **MR. STERN:** That's not been done. I've not seen that
4 before and I had no idea that she had done that analysis.

5 **THE COURT:** Well, one possibility is that the report
6 is produced and you have a chance before you complete your
7 cross-examination to review the report and talk to your expert
8 and then I think that would cure any potential prejudice. It
9 does put us back on time, though.

10 **MR. JORDAN:** What we can do is we can have Mr. White
11 go on now, give him the report, he can meet with his expert
12 and go over it.

13 **THE COURT:** Well, he's made clear I have to say this
14 as well, whatever is the reason, Mr. Stern has said from the
15 beginning he wanted to put the experts back to back.

16 **MR. JORDAN:** How? I assume he's going to call --
17 I'll call her back and he can voir dire or talk to her about
18 these things anyway to put them back to back.

19 **MR. GAGLIARDO:** I want to find out exactly how
20 different the two documents are.

21 **THE COURT:** Okay, do you want to just ask her these
22 questions now? I mean, we're on the record, of course.

23 **MR. STERN:** I'd like to get a copy. I have no idea.

24 **THE COURT:** I understand. Do you have a copy for
25 him?

1 **MR. JORDAN:** I don't.

2 **MR. GAGLIARDO:** Can we talk to the witness?

3 **THE COURT:** No, I think we should talk to the
4 witness on the record. Let's do that.

5 **MR. STERN:** To put initial context and I don't know
6 whether this may be relevant and maybe this was an indication,
7 I did get an e-mail, I don't remember what day and if it was
8 sometime over the weekend or late last week where you asked
9 whether I would consent to her providing a rebuttal analysis,
10 rebuttal testimony and I asked have I been provided a rebuttal
11 report and the answer was no.

12 **MR. JORDAN:** Right. I'm not telling you I did and
13 the reason I didn't is you wanted Mr. Payne in the courtroom
14 and I said if you wanted Mr. Payne in the courtroom can I have
15 her in the courtroom and provide a rebuttal and you said you
16 declined to do that.

17 **MR. STERN:** This is further indication that there's
18 some other report that they wanted to use in one form or
19 another that I haven't had the benefit of seeing.

20 **THE COURT:** I think it's pretty clear there's
21 something that you didn't get.

22 **MR. STERN:** There is.

23 **MR. JORDAN:** There is, there's no doubt and I
24 apologize for that. That was not my reason for saying that. He
25 said he wanted Mr. Payne in the courtroom and I said if he

1 wants Mr. Payne in the courtroom listening to her, I want her
2 in the courtroom listening to him. And then she can put on a
3 rebuttal if you allow that otherwise I don't want Mr. Payne in
4 the courtroom. It had nothing to do with her rebuttal report.
5 It had to do with who was going to be in the courtroom and he
6 declined for Ms. Eisenberg to do that and he said fine, Mr.
7 Payne then will be excluded.

8 **MR. STERN:** I think that's conflating -- there were
9 two different discussions going on. I did ask about having the
10 experts in the room, that was together. That was one thing and
11 then there was a separate e-mail about the rebuttal report and
12 I asked whether or not one has been provided and they said no.

13 **MR. JORDAN:** Right. That was all in the same chain.

14 **MR. STERN:** I don't want to conflate issues. They
15 were two separate issues in my mind. There was some overlap,
16 but they were two separate issues.

17 **MR. JORDAN:** I'm not saying that I prepared it or
18 provided a rebuttal report, I just said --

19 **THE COURT:** It's a pretty serious omission to fail
20 to provide it and it created all this headache now. I don't
21 know when it was prepared. Let's find out some details and
22 we'll figure out where we go next.

23 **MR. JORDAN:** Okay.

24 **THE COURT:** Okay, thank you. We can turn off the
25 husher.

1 (Counsel returned to their trial tables.)

2 THE COURT: Did you want to ask the questions,
3 counsel?

4 MR. JORDAN: Do you want me to ask the questions?

5 THE COURT: Yeah.

6 (Examination of Ms. Eisenberg outside the presence
7 of the jury)

8 BY MR. JORDAN:

9 Q. Ms. Eisenberg, did you prepare a rebuttal report to Mr.
10 Payne's testimony?

11 A. Yes, sir.

12 Q. Okay. And when did you do that?

13 A. November 23, '21.

14 Q. Okay. And I know that you've been reviewing or like going
15 back and forth with a piece of paper. Was that your rebuttal
16 report that you were going back and forth when you were
17 looking at your report?

18 A. It was really the charts so I know exactly which numbers
19 -- the points that we were talking about I went because I know
20 the numbers, so I was looking for the numbers so I could show
21 it on this screen here.

22 Q. Were the points that you were talking about in your
23 original report?

24 A. Yes, but with very less specificity.

25 THE COURT: I'm sorry? I didn't hear your answer.

1 **THE WITNESS:** Yes, with less specificity.

2 **BY MR. JORDAN:**

3 Q. Okay, what do you mean "less specificity"?

4 A. I didn't talk about as many -- I didn't give as many
5 examples.

6 Q. Okay. So you gave more examples of the same points?

7 A. Yes.

8 Q. Okay. And then you're using your report to reference
9 particular exemplar numbers?

10 A. Numbers, yes.

11 Q. What other purpose did you use that document for today?

12 A. Nothing.

13 Q. Okay. I can pass to Mr. Stern.

14 **THE COURT:** How many pages is that report?

15 **THE WITNESS:** Eight.

16 **BY MR. JORDAN:**

17 Q. How many of the pages are charts?

18 A. Six.

19 Q. Okay, so there are two pages of commentary and six pages
20 of charts?

21 A. Well, there's commentary on the -- where the charts are
22 as well.

23 Q. Oh, okay, all right.

24 **THE COURT:** By "chart," what exactly are you
25 referencing? Are you talking about known signatures? Okay,

1 so those are --

2 **THE WITNESS:** So the blue background is the
3 questioned signature. The green are the known signatures.

4 **THE COURT:** So it's laid out in a more user friendly
5 fashion. If anyone had had a chance to look at it, frankly
6 the way I think it would be more useful to a jury to see the
7 questioned document signature side-by-side with the known
8 signatures and that's not how it is in your original report.

9 **THE WITNESS:** Yes, ma'am.

10 **THE COURT:** I mean, what I'm looking at, it's above,
11 but for example, what's on the screen now I don't know if it
12 has a page number from the -- I assume -- I don't know if
13 that's from the actual report.

14 **THE WITNESS:** That's from the original report and
15 that shows all of the signatures.

16 **THE COURT:** Okay, then I think I stand corrected.
17 It's not side-by-side, but the known signatures are underneath
18 the questioned signature as opposed to next to each other.

19 **THE WITNESS:** Yes.

20 **MR. STERN:** But Your Honor, the known signatures
21 cover three pages in the report with the one on top of the
22 first page and then there's two more pages where the known
23 signatures follow.

24 **THE COURT:** Right, because we discussed 20 or so,
25 right?

1 **MR. STERN:** Right, but there's -- I would like to
2 I'm sorry --

3 **THE COURT:** No, go ahead.

4 **MR. STERN:** It sounds to me there's more connecting
5 the dots comparing specifically --

6 **THE COURT:** Yes. She said -- she was asked that and
7 she said there's more information in -- there's less
8 specificity I think is her words.

9 **MR. STERN:** Correct.

10 **THE COURT:** In the original report.

11 **MR. STERN:** Correct. And that's what I heard as
12 well. And then it was -- am I allowed to ask questions at this
13 point?

14 **THE COURT:** Any objection to that?

15 **MR. JORDAN:** No.

16 **THE COURT:** Go ahead.

17 **(Examination of Ms. Eisenberg outside the presence**
18 **of the jury.)**

19 **BY MR. STERN:**

20 Q. And this supplemental report you said was prepared on
21 November 23, 2021?

22 A. Yes, sir.

23 Q. And that was after having the opportunity to review Jeff
24 Payne's report?

25 A. Yes, sir.

1 Q. And in reviewing Jeff Payne's report -- was some of this
2 analysis in this November 23, 2021 report, were some of these
3 analyses in response to Jeff Payne's commentary?

4 A. Yes. Excuse me, can I just explain? Mr. Payne pointed
5 out differences in his report. And what I did in my
6 surrebuttal report was show that he omitted similarities in
7 some of the other exemplars. He just omitted them when they
8 existed.

9 **THE COURT:** But she hasn't testified about that.

10 **MR. JORDAN:** Right.

11 **MR. STERN:** I understand, but this is guiding her
12 analysis and she's presenting to the jury while she's not
13 specifically pointing out what she's critiqued saying Mr.
14 Payne -- I disagree with Mr. Payne, this is guiding her
15 analysis. And Your Honor, we move to strike and we did not --
16 we were not provided with this report and this is guiding the
17 testimony based on some analysis that we've never seen before.

18 **THE COURT:** Well, I don't know that because I don't
19 actually know what the report says and I certainly haven't
20 compared it to the original.

21 **MR. STERN:** But she just testified --

22 **THE COURT:** She said it has more specificity.

23 **MR. STERN:** But she also said part of this analysis
24 is driven by her analysis of Jeff Payne's report. So that is
25 not what we've been presented with and that's not what she's

1 testifying about. That's the problem. I mean, that is what
2 she's testifying about, let me clarify. This supplemental
3 report she's been referring to. We've established that she's
4 been referring to this as she's giving testimony. And part of
5 that supplemental report while I understand she's not
6 specifically said Jeff Payne said X and let me point that out,
7 but it's clearly guiding her analysis in what she's presenting
8 to the jury. And part of her analysis that she's now
9 presenting to the jury is an analysis that we have not seen
10 before. And this was done only after Jeff Payne provided his
11 report. And so they've had this for over -- they've had this
12 for over two years.

13 **MR. JORDAN:** Your Honor, first off I don't think
14 we've established that Ms. Eisenberg has gone outside the four
15 corners of her report.

16 **THE COURT:** You don't think you've established what?

17 **MR. JORDAN:** That Ms. Eisenberg has gone outside the
18 four corners of her report. And second, they didn't choose to
19 depose Ms. Eisenberg. So, I mean, they could have asked her
20 whatever questions they had in the interim period. They let
21 her go -- we asked for Mr. Payne's deposition and got it. And
22 there's no reason that I know of that -- I don't think there
23 was an order -- there was an order saying that John White
24 couldn't testify, but not an order saying that --

25 **THE COURT:** I appreciate that they could have and

1 should have perhaps, but that doesn't really answer my concern
2 because they still had a right to rely on the report that they
3 got. And for the life of me, I'm trying to understand what
4 would have led you to not disclose a supplement prepared in
5 November of 2021.

6 **MR. STERN:** Your Honor --

7 **THE COURT:** Wait, I'm sorry. What?

8 **MR. JORDAN:** It was just an oversight. It wasn't an
9 intention.

10 **THE COURT:** Oversight, but it's two years ago. It's
11 not an oversight now. It's a very serious mistake.

12 **MR. STERN:** Your Honor, this is why -- we didn't --
13 we did not know to even ask for this request to depose her
14 based on this new report because of the very absence of it. We
15 did not know about it. That alone puts us at a disadvantage.

16 **THE COURT:** I don't know whether you would have --
17 this wouldn't -- if you didn't do it before I personally doubt
18 you were going to do it at all, so let's not go there. But you
19 were entitled to the report. And you should have had the
20 report. And I now have a situation where it's a violation of
21 the rule, they were entitled to it. I don't know whether the
22 witness' testimony deviates from her original report. It
23 certainly is more fulsome as she would have I think conceded
24 because she says that the supplement had more specificity.
25 And the specificity seems to include more description about

1 some of the things that make her opinion more reliable: The
2 differences in the signatures pointing out, for example, the
3 pointy J versus the rounded J; the U; the way the Es appear,
4 et cetera. So I mean, I have a big concern and I think I have
5 a big problem. And what's the remedy?

6 **MR. STERN:** Your Honor, the jury has heard this.

7 **THE COURT:** I'm not prepared to rule that I'm
8 striking her testimony. So we have to see if we can come up
9 with another solution. One solution is that --

10 **MR. STERN:** Well, Your Honor, should we be having
11 this discussion in front of the witness at this point?

12 **THE COURT:** Yeah, perhaps you should step outside.
13 It's not substantive about her testimony.

14 **MR. STERN:** Also it seems that we should also have a
15 copy of this report.

16 **THE COURT:** Yes, I know that. But if you don't mind
17 waiting outside.

18 **THE WITNESS:** I don't mind. Do you want a copy?

19 **MR. GAGLIARDO:** I was just looking for a copy.

20 **(Witness exited the courtroom.)**

21 **MR. STERN:** Just so we know, can Denis --

22 **THE CLERK:** I can make a copy.

23 **THE COURT:** Okay, we're going to get copies made.

24 **MR. STERN:** I think that's the easiest way.

25 **THE CLERK:** Your Honor, how many copies?

1 **THE COURT:** One for me and one for the other side.
2 Actually, three copies.

3 **MR. JORDAN:** I need one.

4 **THE COURT:** I mean, there are a lot of options. One
5 is if you wish to depose her, that's an option. Another option
6 is that I delay the opportunity for your cross until you have
7 a chance to confer with your expert. And I really don't know
8 for a fact that there's -- let's not conflate the fact that
9 there was a violation of counsel's obligation to produce that
10 document with whether it actually is significant. That I can't
11 answer. And at the moment I'm concerned with whether
12 substantively this amounts to anything. That's -- because I'm
13 in the middle of a trial with a jury in the box. We've already
14 invested three days in this case and I don't think anybody
15 wants to start over.

16 **MR. JORDAN:** No.

17 **THE COURT:** Which is another option.

18 **MR. STERN:** Your Honor, I have to reserve my right
19 for that.

20 **THE COURT:** I'm sorry?

21 **MR. STERN:** I have to reserve my right for that
22 being an option. And I want to note for the record that that
23 may be what may be necessary. I don't take that lightly and --
24 but at this point the jury is hearing her testify about things
25 that we haven't seen.

1 **THE COURT:** Right, but there may be other cures
2 short of basically starting over with a new jury.

3 **MR. STERN:** I understand.

4 **THE COURT:** I don't know if you really want that.

5 **MR. STERN:** I'm just -- I don't want there to be any
6 indication that I've consented to waiving that.

7 **THE COURT:** Well, you haven't.

8 **MR. STERN:** All right.

9 **THE COURT:** I wouldn't expect you to. But that's not
10 the issue. The issue is --

11 **MR. STERN:** I understand.

12 **THE COURT:** How, what options are available to
13 ameliorate the error so that I can preserve the ability of the
14 case to go forward. And at the end of the day, I don't know
15 whether anything she said really varies from her original
16 report. And the fact that she has additional examples of what
17 she said all along may be much ado about nothing. And that's
18 what I don't know. I haven't read either report. Typically
19 reports don't even come in. So I was surprised to see that.
20 Usually the expert testifies and their reports don't come into
21 evidence. You all agreed, so they're in evidence. And it's not
22 a script. But the fact is as -- I'm going to say this, as a
23 technical matter, you should have had that report and it's
24 incomprehensible to me that you don't have it. But whether it
25 really is causing any harm is what I'm now focusing on. And if

-- lots of times in cases, not necessarily mine, but in cases as you all know from reading opinions issued by higher courts, when the witness -- when there's something unexpected and the other side is afforded an opportunity to address it with perhaps speaking to a surprise witness or whatever it might be, that's usually sufficient. So that's why I'm suggesting that delaying your cross and giving you a chance to confer with your expert might be the solution.

So the very first thing I notice is that this is clearly in response to the defense expert. And this is -- this Court allowed the defense to substitute Mr. Payne if I remember so always no act of kindness goes unpunished. I let the defense have Mr. Payne and I don't remember for sure, I'd have to go back to my notes, but it was probably over the plaintiff's objection. And I think it's in ECF 159, my order letting you substitute someone who I think hadn't been timely named or something to that effect. But I don't want to misstate anything. And she says in line 2, "The Payne report does not alter my opinion of *no conclusion*" in italics "regarding the authenticity of Mr. White's signature." And then she talks about what Mr. Payne talked about.

MR. STERN: Well, it looks like there's some additional -- she does respond to Mr. Payne's analysis and said, "Therefore, while it's feasible that a second" --

THE COURT: Where are you? It's a multipage report.

1 **MR. STERN:** The second full paragraph on the first
2 page, first paragraph AB and then "Therefore," Your Honor, do
3 you see that?

4 **THE COURT:** Yes.

5 **MR. STERN:** "While it's feasible that a second
6 writer created a signature with habits similar to Mr. White's,
7 it's equally possible that Mr. White wrote his own name given
8 Mr. White's broad range of variation. It is also feasible
9 that the appearance of the questioned signatures do too."
10 None of this was in her analysis before. That's new.

11 **MR. JORDAN:** This is her analysis. This is the
12 inconclusiveness of the analysis.

13 **MR. STERN:** I'd like to see where she makes mention
14 of these things in her original analysis.

15 **THE COURT:** Well, she talked in her testimony today
16 about irregular writing surfaces and pen malfunctions.

17 **MR. STERN:** That's not in the original analysis.

18 **THE COURT:** That's not in the original report you
19 mean?

20 **MR. STERN:** And she's not talking about anything
21 specific in the questioned document. That was one of the
22 things that was so surprising to me and why -- and it affected
23 my decision about how to examine because there was -- and part
24 of the issue is the first, I think the first thing -- let me
25 turn back. I think the first thing she points to in the report

1 is quality. And when we -- quality is item number one in her
2 report. I'm looking at the one that's in evidence, Exhibit 18.
3 Page 3.

4 **THE COURT:** Okay.

5 **MR. STERN:** And we spent time going through and I
6 expect a lot of my cross-examination is going to be geared
7 towards the quality of the documents. For some reason when we
8 looked at the quality of her documents compared to the quality
9 of the copies that Mr. Payne was using, I don't know why hers
10 are so much blurrier. And look at her enlargement on that when
11 you compare it to -- I don't know, I have no idea why this is
12 the case so I just want to know -- one of the issues was the
13 quality. And hers were all blurry and I don't know why that's
14 the case. Or faded.

15 **THE COURT:** Well, that's not relevant to what we're
16 talking about.

17 **MR. STERN:** I know, but this was item 1 in her
18 report. Item 2 is comparability and she does not connect any
19 of this and doesn't give any critical analysis of the Q1 as
20 she's doing here. Same thing with the quantity. There's
21 nothing pointing to the areas of the Q1, which is the
22 questioned document, that show whether it's a simulation which
23 obviously I acknowledge that's up to us, I'm not -- but
24 there's also the other parts of the analysis where she's
25 pointing out there are indications that it could potentially

1 be authentic, which we've never seen that before.

2 **THE COURT:** Which part you said you've never seen?

3 **MR. STERN:** The end of this paragraph on page --

4 **THE COURT:** The new report or the old one?

5 **MR. STERN:** The new report. The new report, the ABC,
6 this is something new and I haven't even gotten to the second
7 page yet. And this whole -- she doesn't go through relative
8 height ratios comparing -- I'm now on page 2 of her
9 supplemental report.

10 **MR. GAGLIARDO:** Your Honor, if I may.

11 **MR. STERN:** There's nothing about the relative slant
12 analysis. She doesn't even uses the phrase "relative slant" I
13 think in the original report. I remember that was another term
14 I was like I don't remember hearing this before. So there are
15 new things in here that we have not -- that were not part of
16 her original report. And I'm just looking at this for the
17 first few minutes. I haven't had time to really dig in and
18 spend time analyzing. I'm just -- and here, I will point out--

19 **THE COURT:** Well, it's very clear and I haven't
20 studied it, I'm just looking at it for the first time and very
21 quickly but it seems very clear that this is in response to
22 the Payne report. That word appears repeatedly. The Payne
23 report this, the Payne report that. And she's answering the
24 Payne report. The problem is that in answering the Payne
25 report, she was more descriptive and more precise than she was

1 in her original report. And that's a problem because they
2 weren't told. And I think she needs to -- her testimony needs
3 to be limited to what was in her original report, in fairness.

4 Or conversely, another option would be to the extent that
5 the testimony has already come in, then the defense has to be
6 entitled to an opportunity to confer with Mr. Payne to find
7 out what, if any, additional material should be pursued in
8 cross-examination.

9 **MR. GAGLIARDO:** We have no objection.

10 **MR. JORDAN:** No objection to that, Your Honor.

11 **THE COURT:** I mean, if that -- the report isn't
12 coming into evidence. So to the extent it has all this
13 information in it, as far as the jury is concerned it's never
14 going to be known by the jury. And if what she said so far
15 varies from what she previously said -- and I don't know that
16 it varies, I think it's definitely more detailed or as she
17 said, used the word specificity, has greater specificity, then
18 you can follow-up with Mr. Payne and attack it if you're able
19 to. But how are you injured if I give you that opportunity?

20 **MR. STERN:** Um, I can't speak for Mr. Payne how long
21 it takes him to analyze someone else's work.

22 **THE COURT:** Well really what you need is the
23 transcript of what she said.

24 **MR. STERN:** There's that, yes. There's also, I do
25 know from watching her she was looking down at this report

1 that we now have in our hand dated November 23, 2021 and
2 that's when it occurred to me that -- and then she would turn
3 to the other report. It looked like she was mixing and
4 matching analyses by relying on the November 23, 2021 report
5 with the October 11, 2021 report saying I'm going to look at
6 November 23 and use that to augment my October 11. And that's
7 the issue. And that's the --

8 **THE COURT:** But it's clearly meant to address Mr.
9 Payne's report of --

10 **MR. STERN:** So she's now filling in gaps I guess for
11 lack of better terms that we -- that we're not familiar with I
12 guess is one way to say it, or at least is one way it appears.
13 I don't know. But look, it's a mixed bag, I'll say. Like on
14 one hand it seems like in looking at Mr. Payne's report she
15 realized that oh yeah, there are indications of simulation. I
16 understand that is good for us. But on the other hand there's
17 a lot more detail that she's using to try to justify her in
18 conclusion analysis saying there's also signs of authenticity
19 to it and that's a problem.

20 **THE COURT:** Well, for one thing when the jury goes
21 back into the jury room the jury won't have her transcript,
22 they'll only have the report and the report doesn't say those
23 things, for what little that may be worth. But most of what's
24 in this report has not been testified to.

25 **MR. STERN:** Well --

1 **THE COURT:** By "this report" I mean November 23,
2 2021.

3 **MR. STERN:** Understood. But Your Honor, what she
4 has testified to while she hasn't specifically said "as I
5 wrote on November 23rd," but what queued me in was how she was
6 looking down and having some quick reference to connect I'm
7 just going to use --

8 **THE COURT:** I'm not troubled by that. I mean, an
9 expert like any witness, I mean, she could have prepared
10 herself for trial and found something more useful than her own
11 -- it's not a Bible. She's not bound to just stick to in order
12 to sort of decide how to answer a question, it's not a script.
13 I've said that before. I'm not troubled by the fact that she
14 had other resources, but --

15 **MR. STERN:** It's another analysis.

16 **THE COURT:** But you didn't have notice. That's what
17 troubles me.

18 **MR. STERN:** And there's additional analyses.

19 **THE COURT:** Right, but most of it is about the Payne
20 report and she hasn't been asked any of those questions. So I
21 think -- I'm not going to minimize it. I'm troubled by
22 experienced counsel failing to produce this report. There's no
23 way around that -- and causing this big headache.

24 She definitely talks about examples of how she's unable
25 to make a conclusion. At the end of the day that opinion is

1 never changed. She doesn't reach a conclusion that Mr. White
2 was the author. She's basically buttressing her opinion that
3 she can't make a conclusion. So I think the solution --
4 because these are my choices: I declare a mistrial and we
5 start over. Do you really want me to do that other than you
6 want to save it on the record so that you could have a good
7 appeal point if you lose? But do you really want me to start
8 over?

9 **MR. STERN:** Can I confer with my client and my
10 co-counsel?

11 **THE COURT:** Sure. I'm not saying I will regardless
12 of what you tell me, but just tell me truly as an officer of
13 the court if you actually truly want me to start over.

14 **MR. STERN:** I understand. And also, Your Honor,
15 whatever I say I have to make sure no matter what, I have to
16 make sure the record is clear that I'm preserving that issue
17 or appeal if --

18 **THE COURT:** Well, I don't think that's fair because
19 if you do that and -- if you're going to say one thing and
20 mean another, that's not fair. So if you tell me you don't
21 really want to start over but you're reserving your right to
22 complain that we don't start over, then I might just start
23 over.

24 **MR. STERN:** All right.

25 **THE COURT:** I mean, I don't know. I feel like I'm

1 between a rock and a hard place and I blame plaintiffs for it,
2 I really do. This is experienced lawyers failing to turn over
3 a document like this is inexplicable to me.

4 **MR. STERN:** And Your Honor, I don't take --

5 **THE COURT:** I'm sorry, I didn't mean to interrupt
6 you but I'll just finish my thought. It's inexplicable,
7 indefensible, but it doesn't necessarily mean that it actually
8 is irreparable harm to you because I've offered ways that I
9 think we can cure it. And if I didn't believe that those were
10 genuine cures I couldn't live with myself and we wouldn't do
11 it. So we're talking two separate things. I've got the one
12 hand sure, this was wrong and then what do I do if I can to
13 fix it? And that's where I am right now. Can I offer you a
14 solution that will remediate this problem?

15 **MR. STERN:** I understand. And Your Honor, I didn't
16 mean to be disrespectful.

17 **THE COURT:** I understand you need to talk to your
18 client.

19 **MR. STERN:** And this is a lot to consider in a
20 relatively short period of time and I don't take --

21 **THE COURT:** Do you want me to recess for the day?
22 But then I need to know whether we're reconvening tomorrow and
23 at what time and what I tell the jury about -- not to harp on
24 this for you, but I did expect the case to be finished by
25 Monday and I have a pretty busy day Tuesday. I don't remember,

1 I didn't look to Wednesday and I don't know that I can change
2 those things.

3 **MR. STERN:** Your Honor, I just want to be -- I do
4 not take -- I'm not taking asking for -- I want to be clear,
5 I'm not taking the concept of asking for a mistrial and
6 starting over lightly. I'm actually -- that's a lot of stress
7 for a lot of reasons.

8 **THE COURT:** Right. And because then at the end of
9 the day where will you be? I'm not going to dismiss their
10 case as a sanction. So we'll start over. You'll have the
11 report and then what? So Mr. Payne will do what for you and
12 what will we do differently at the next trial? You'll have
13 the report, this will come in and then where are we?

14 **MR. STERN:** Also I have no idea how long it would
15 take for me to get adequate input from Mr. Payne. I know how
16 much --

17 **THE COURT:** Well, I know this. He's available
18 because he's going to be testifying.

19 **MR. JORDAN:** He's actually here right now.

20 **MR. STERN:** What I'm trying to explain though is
21 there's been several conversations we've had as he tells me
22 information so I can learn -- I'm not a handwriting expert,
23 Your Honor, but I've got to learn from my expert to make sure
24 I can ingest and comprehend. This is not something like hey,
25 talk to him for two or three hours and problem solved, at

1 least that's not the way I learn. And than I'm going to toot
2 my own horn a little bit here. When we were going back and
3 forth he told me it's pretty impressive how I learned the
4 stuff as well as I have.

5 **THE COURT:** But it wasn't that much that you have to
6 learn. You already learned a lot because you already spent
7 time with him. He was preparing with you what to say on
8 cross. So the only things now that you need to get educated
9 about are things that are new and how much was that really?

10 **MR. STERN:** It could be a lot.

11 **THE COURT:** But we know what it was. It's not a lot.
12 It doesn't seem like it's a lot. It seems like it's about a
13 little more detail about the Es, the loops, the slant, the
14 uneven writing surface, the pen not rolling smoothly.

15 **MR. STERN:** Your Honor, I'll just note I don't know
16 exactly when Ms. Eisenberg got the Payne report, but there's
17 at least been -- there's at least -- I don't know how much
18 time there was, but there's a month-and-a-half between her two
19 reports here. I'm just --

20 **THE COURT:** Yes.

21 **MR. GAGLIARDO:** Let me try to narrow the focus to
22 what I think is salient. First of all, the original report on
23 page 3 under findings is exactly the same -- is the same as
24 the witness testified today and the same as contained in the
25 second report.

1 **THE COURT:** When you say "the same," what are you
2 pointing to?

3 **MR. GAGLIARDO:** Her finding is that she cannot
4 conclusively say whether it was John White who signed it or
5 someone else.

6 **THE COURT:** Well, I made that point already.

7 **MR. GAGLIARDO:** Right, correct.

8 **THE COURT:** The ultimate opinion is the same. The
9 question is how did she get there.

10 **MR. GAGLIARDO:** Right.

11 **THE COURT:** And she was offering more examples today
12 apparently. And I can't represent this as accurate because I
13 didn't study either report. But it appears, she said it
14 herself, there's more --

15 **MR. GAGLIARDO:** Specificity.

16 **THE COURT:** --specificity in what she was saying
17 today than is contained in her original report.

18 **MR. GAGLIARDO:** Correct. I think the proper cure is
19 the second option that you suggested which is that Mr. Stern
20 have an opportunity to consult with Mr. Payne.

21 **MR. JORDAN:** Who is here.

22 **MR. GAGLIARDO:** He's been sitting in the hallway
23 since we came back from lunch, at least since then.

24 **THE COURT:** Well, here's a reason we should have let
25 experts sit in on the testimony, which is not uncommon.

1 **MR. GAGLIARDO:** Well, here's the final point: The
2 difference between the two experts, besides their ultimate
3 conclusions, that Ms. Eisenberg says insufficient samples to
4 do anything more than make a definite conclusion. And Mr.
5 Payne says, I had enough, I made a definite conclusion. That's
6 the debate between the two experts. In terms of what they see
7 in terms of hooks and points and whatever these, you know,
8 other specifics are, I don't think there's a great deal of
9 difference. There may be something here or there, but I think
10 it's the interpretation, not the analysis.

11 **MR. STERN:** Your Honor, this is to the point I was
12 going to make right now. I'm sorry.

13 **THE COURT:** I was going to say it's only 3:10. So if
14 we recess for the day as much as I don't want to, that would
15 certainly give you time to confer with Mr. Payne and review
16 all this.

17 **MR. STERN:** I will talk with him as soon as --
18 whenever we are recessed for the day. But in response to what
19 Mr. Gagliardo just said, one of the things I was about to say
20 before he spoke and what occurred to me in looking at this
21 going back to the original report versus the supplemental one
22 is part of -- if you look, when Your Honor reads the original
23 report, two of the three factors that she points to is why she
24 can't reach a conclusion is based on quality of images and the
25 quantity of samples. Okay? So now with the same samples after

1 reading Jeffrey Payne's report, she now is able to connect the
2 dots based on the samples she has and the quantity of samples
3 she has to make a more detailed analysis pointing out well,
4 when you look at this mark, or this angle, or this hiatus, or
5 this pen lift, or this slant -- I forgot the term of art that
6 she used, I never saw that term of art before -- this is a big
7 change from what was previously hey, not enough for me to be
8 able to tell and the quality of my images aren't so great. And
9 without that connecting those dots. So that's a pretty
10 significant change it appears to me with what I'm reading
11 right now for about however long we've had it.

12 **MR. GAGLIARDO:** That all sounds like
13 cross-examination to me.

14 **MR. JORDAN:** And I don't think that that's an
15 accurate recitation of either of her reports.

16 **THE COURT:** Okay, well whether it's been somehow
17 amplified as a result of reading Mr. Payne's report or not, if
18 you're provided an opportunity to confer with your expert,
19 have I cured the problem? Because you now have the report
20 belatedly, you have the report and you're going to have time
21 to talk to your expert. So compartmentalizing, as I'm
22 attempting to do, what I think was a serious failure of the
23 plaintiff to provide the report to you in a timely manner and
24 now we're here in the middle of the trial, have I not
25 adequately given you a cure?

1 **MR. STERN:** I don't know the answer to that. I'm not
2 being --

3 **THE COURT:** No, I understand. Okay, so you're going
4 to confer with your client and tell me if you want -- I'm
5 going to send the jury home no matter what, but I'm going to
6 let you confer with Mr. White now and then everyone else will
7 stay put. Let's bring in the jury. I'm going to bring them
8 back tomorrow morning at 9:30 with the hope that you're all
9 satisfied we should continue, but I'll let you have a chance.
10 I'm here, I'm not going anywhere and we'll give you all the
11 time you need to talk to your client and then to talk, of
12 course, to your expert who I let you have.

13 **MR. STERN:** Your Honor, just to -- like I said I
14 don't know the answer to that, it's because as an officer of
15 the court I take my responsibility seriously to respond and
16 try to figure out what's reasonable. So that's why I was
17 purposely saying I don't know.

18 **THE COURT:** I understand.

19 **MR. STERN:** I'm taking everything that you're
20 saying--

21 **THE COURT:** I know you'll factor in the fact that it
22 costs money to go to trial and if you all -- if you come to
23 the conclusion, it will be a factor in my consideration, it
24 will not necessarily control my decision. But obviously, if
25 you tell me that you think you're so harmed by what happened

1 that we need to start over, I'm going to take that into
2 account and make my decision as to whether we resume tomorrow.
3 And I would ask Denis to make sure subtly that we have contact
4 information for all the jurors so that if I decide tonight
5 that we're not going forward, they don't even have to come in
6 tomorrow.

7 **MR. STERN:** And Your Honor, I want to make sure I
8 understand the sequence of events.

9 **THE COURT:** I'm going to send the jury home now. I'm
10 going to tell them to come in at 9:30, that we hit a roadblock
11 if that's okay, and I don't want to waste their time so I'm
12 going to let them go while we iron out some issues. And in
13 the meantime I'm going to make sure my courtroom deputy has
14 their contact information because in the event between now and
15 when you leave if I decide that I can't go forward tomorrow in
16 fairness to you, then they'll be contacted and I won't bring
17 them in at all.

18 **MR. STERN:** Understood. So we're --

19 **THE COURT:** We're not leaving. Your side,
20 plaintiff's side and I, we're staying. It's only the jury I'm
21 sending away. The first order of business is for you to talk
22 to your client and find out what he wants to do, taking into
23 account your wisdom and his personal lawyer sitting there as
24 well. And then if you should decide to go forward, of course
25 you'll have time you didn't know you were going to have to

1 talk to Mr. Payne. And if he's an expert, I don't think it's
2 going to take him that long. And I know you're smart, so I
3 don't actually think it will take you that long to get up to
4 speed either with whatever is new that this witness testified
5 to.

6 **MR. STERN:** I just want to make sure that we'll have
7 some other place to go in the courthouse and then we come back
8 for us to confer? Because my voice carries and I don't want
9 to be whispering.

10 **MR. JORDAN:** Is there a witness room?

11 **MR. STERN:** Is there someplace we can go?

12 **THE COURT:** We used to have witness rooms back there.
13 I don't know what condition they're in. There's a jury room
14 so after the jury leaves, you can go in there.

15 **MR. STERN:** I want to make sure it's not like hey,
16 we're all here waiting for us to decide. I want to take my
17 time to deliberate, get input from my client, get input from
18 my expert, get input from as you noticed there's another
19 lawyer here. The whole team. This is not going to be a few
20 minute endeavor. I want to make sure I'm not holding --
21 you'll recess and then we'll say hey, we're ready to come
22 back.

23 **THE COURT:** I mean, I know it's a big decision but I
24 don't think it should take that long. And why don't you make
25 yourselves -- I'm happy to make the jury room available to

1 you.

2 **THE CLERK:** Your Honor, I can open up Judge Bredar's
3 jury room.

4 **MR. STERN:** So we can confer privately.

5 **THE COURT:** But if you think it's going to take
6 hours, we do want to know because I don't want to keep them
7 here for hours.

8 **MR. STERN:** I don't think it will take hours for us
9 to decide, but I'm a pretty deliberative person. I want to
10 make sure that I'm thinking through this process appropriately
11 and I don't want to be -- this is not a decision I ever
12 anticipated making in my career. Let's put it that way.

13 **THE COURT:** And don't forget, next time around
14 everybody just gets better. So this might be your respective
15 shots, I don't know, because you'll all have transcripts and
16 you'll know what you did wrong and what you did right and
17 you'll fix it. So it's up to you how you want to go and
18 whether I grant the request. But the first instance is do you
19 make the request and that's where you need to talk to Mr.
20 White.

21 **MR. STERN:** Yes.

22 **THE COURT:** And we're going to make the jury room
23 available from the courtroom next door. I would ask
24 plaintiff's group to please stay here. All you need to do is
25 somehow -- how shall they let me know they're ready to

1 convene?

2 **THE CLERK:** Your Honor, I will stay in the courtroom.

3 **MR. STERN:** So Denis will stay here.

4 **THE COURT:** And he'll get the court reporter and in
5 the meantime we can -- I'll let plaintiff send their witness
6 home and stay in touch with her and we'll bring in the jury.
7 So let's get them on their way. That's the most important
8 thing. I've already imposed on them enough.

9 **(Discussion held off the record.)**

10 **THE COURT:** And just a heads-up, counsel, when we're
11 bringing in the jury. The courtroom deputy said that when the
12 cases are over they hand out work slips and because I don't
13 know if the case is over, we came up with a way in which he's
14 going to just subtly say "Since we're getting out early I
15 thought I'd take this chance to hand out your work slips
16 today, hold onto them" and then he's going to ask them to
17 remain so he can give them to them because I don't know the
18 answer to whether we're going forward tomorrow, but if we
19 don't go forward they need those slips. Does that work?

20 **MR. GAGLIARDO:** They won't know whether we're
21 continuing --

22 **THE COURT:** No, they won't know. We're going to make
23 it seem like this is just a convenient time to hand them out.

24 **MR. GAGLIARDO:** Thank you.

25 **(The jury reentered the courtroom at 3:26 p.m.)**

1 **THE COURT:** Ladies and gentlemen, we have some
2 matters to discuss, counsel and the Court so I thought we
3 could finish more quickly than it now appears we can. And so I
4 can't justify keeping you in the jury room while we iron out
5 some of these issues. So I think it's best if I just allow
6 you to leave for the day rather than continue to impose on you
7 because it's already almost 3:30.

8 So with that, of course I'm going to excuse you with the
9 reminder that you must continue to keep an open mind and you
10 must not discuss the case with anyone or allow anyone to
11 discuss the case with you. And I think the clerk was going to
12 take advantage of the time just to hand out some paperwork to
13 you so I think you might be -- you want them to go in the jury
14 room to hand them out?

15 **THE CLERK:** Yes.

16 **THE COURT:** From there you'll be on your way. So
17 I'll see you tomorrow bright and early. I ask that you be in
18 that jury room at 9:25 and we should be ready for you at 9:30.
19 Have a very pleasant evening. The jury is excused.

20 **(The jury was excused at 3:27 p.m.)**

21 **THE COURT:** Okay, so as soon -- do you have what you
22 need?

23 **THE CLERK:** I just need to print it out, Your Honor.

24 **THE COURT:** So it will take a few minutes to do
25 that, to print the forms.

1 **THE CLERK:** Yes.

2 **THE COURT:** So I don't think we should excuse your
3 witness until we know the jury is on its way so they don't run
4 into each other.

5 **MR. JORDAN:** Right.

6 **THE COURT:** As soon as the courtroom deputy tells me
7 the jury is gone -- or you can tell her to go now while
8 they're still in the jury room if you want to do that.

9 **MR. JORDAN:** Okay.

10 **THE COURT:** And just be sure you're in touch with
11 her to know whether she should return tomorrow morning. And
12 we'll just ask everyone else to stand by and as soon as -- in
13 a few minutes really it should be the case, Mr. Stern, that
14 the courtroom deputy is able to open up the adjoining jury
15 room for your convenience. And until further notice which I
16 expect to be as soon as possible, we'll stand in recess.

17 **(Recess was taken from 3:29 to 4:39 p.m.)**

18 **(Requested excerpt is complete.)**

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1 CERTIFICATE OF OFFICIAL REPORTER

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5 I, Nadine M. Bachmann, Certified Realtime Reporter
6 and Registered Merit Reporter, in and for the United States
7 District Court for the District of Maryland, do hereby
8 certify, pursuant to 28 U.S.C. § 753, that the foregoing is a
9 true and correct transcript of the stenographically-reported
10 proceedings held in the above-entitled matter and that the
11 transcript page format is in conformance with the regulations
12 of the Judicial Conference of the United States.

13
14 Dated this 22nd day of February, 2024.

15
16 /s/

17
18 _____
19 NADINE M. BACHMANN, CRR, RMR
20 FEDERAL OFFICIAL COURT REPORTER
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